CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 105

D. J. F. STROTHER, PETITIONER,

vs.

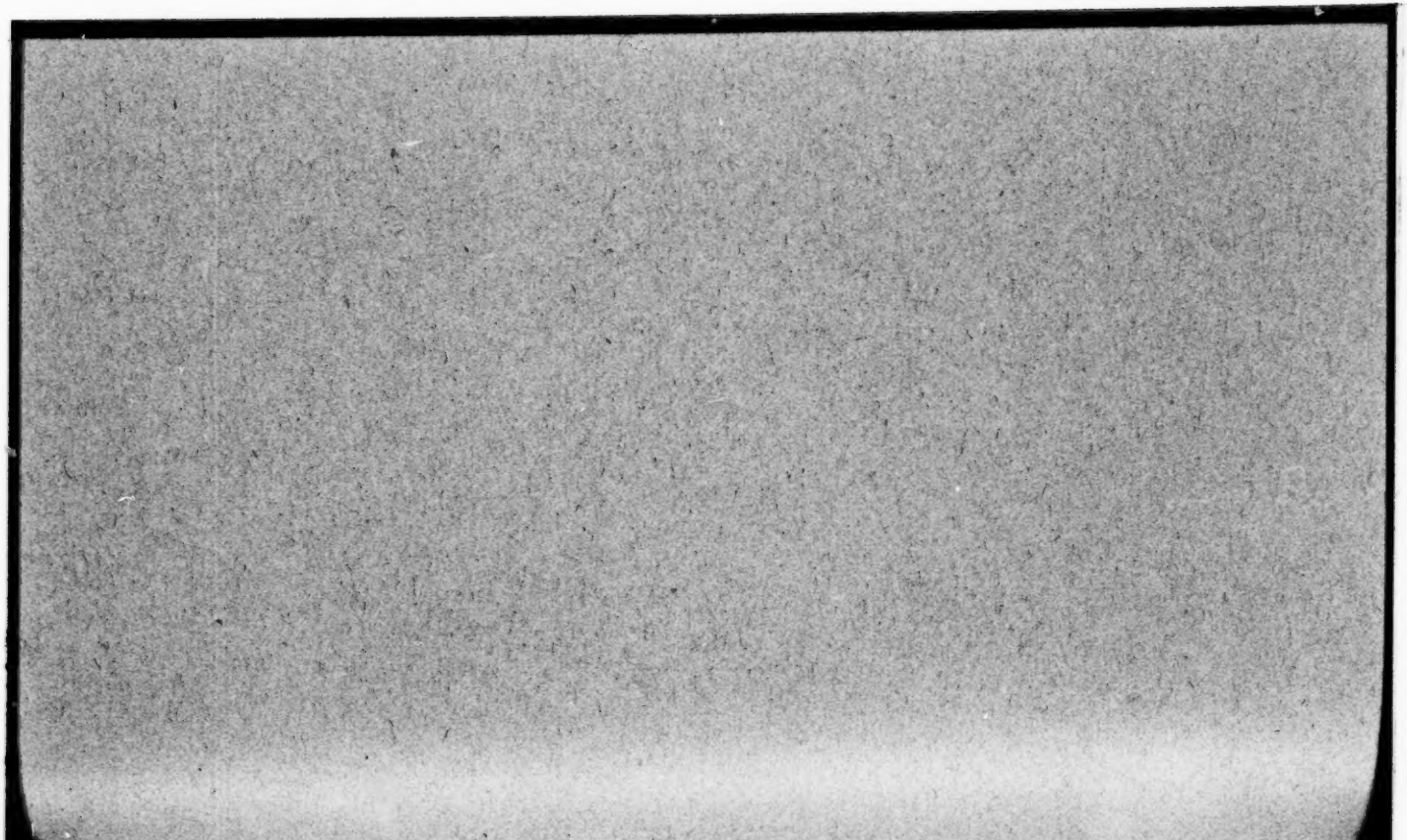
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,802)



(36,802)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 105

D. J. F. STROTHER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TRANSCRIPT OF RECORD

Docket No. 10472

APPEARANCES:

For Petitioner:
Camden R. McAtee, Esq.,

For Respondent:
W. F. Gibbs, Esq.,
M. E. McDowell, Esq.,
F. B. Schlosser, Esq.

D. J. F. Strother, Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

DOCKET ENTRIES

1925
Dec. 30—Petition received and filed.

1926
Jan. 6—Copy of petition served on Solicitor.
Jan. 6—Notification of receipt mailed taxpayer.
Jan. 21—Answer filed by Solicitor.
Jan. 27—Copy of answer served on taxpayer—assigned to General Calendar.
Apr. 29—Motion to consolidate for hearing with 25275 filed by General Counsel.

1927
May 10—Hearing set on motion June 27, 1927. (See 25275).
June 27—Hearing had before Mr. Green on respondent's motion to consolidate with 25275. Granted.

June 28—Order motion to consolidate be granted; proceeding remain on General Calendar signed and filed. Both sides notified.
Sept. 8—Motion to consolidate for hearing with dockets 18679, 18680, 26655, 26656, 25275, 14516 and 14517, filed by taxpayer. See 18679. Granted 9/8/27.

1928
June 27—Hearing set 9/11/28.
July 19—Motion for a continuance to Oct. 10, 1928, filed by taxpayer. See 18679. Granted 7/23/28.
Oct. 9—Motion for a continuance of 60 days filed by taxpayer. See 14516. Granted to 12/10/28.
Dec. 6—Motion for a continuance to Feb. 15, 1928, filed by taxpayer. See 18679.
Dec. 8—Motion for a continuance granted to 2/19/29.

1929
Jan. 28—Motion for a continuance to 4/15/29 filed by taxpayer—granted.
Mar. 22—Motion for a continuance to 5/2/29 filed by taxpayer. 3/25/29 granted.
May 2 & 3—Hearing had before Mr. Smith. Heard with 25275, 32170, 14516, 14517 and 42664. Briefs due 90 days from date.
May 20—Transcript of hearing May 2 and 3, 1929 filed.
July 17—Motion for extension of 30 days from Aug. 1, 1929 to file briefs (both parties) filed by
(2) General Counsel.
July 19—Motion for extension of 30 days granted.
Aug. 28—Brief filed by General Counsel.
Aug. 31—Motion for extension to Sept. 10, 1929 to file brief filed by taxpayer.
Sept. 4—Motion granted.
Sept. 10—Requested findings of fact and brief filed by taxpayer.

1930
Jan. 22—Findings of fact and opinion rendered by Chas. P. Smith, Division 5. Judgment will be entered under Rule 50.
Feb. 27—Motion for rehearing and modified findings of fact and opinion filed by taxpayer.

Mar. 6—Order denying motion of Feb. 27 for rehearing entered.
Mar. 31—Notice of settlement filed by General Counsel.
Apr. 4—Hearing set Apr. 23, 1930, on settlement.
Apr. 21—Motion for continuance of 30 days on settlement filed by taxpayer. 4/22/30 granted and set for hearing May 21, 1930.
May 21—Motion for order to withhold determination pending 14516, filed by taxpayer.
May 21—Order for continuance to June 18, 1930 on Rule 50 entered.
May 24—Transcript of hearing of May 21, 1930, filed.
June 18—Hearing had before Mr. Smith on proposed redetermination under Rule 50.
July 1—Transcript of hearing of 6/18/30 filed.
July 15—Order that hearing under Rule 50 be continued to Day Calendar of Aug. 13, 1930 entered.
July 15—Order that motion for rehearing be denied entered.
Aug. 12—Objections and counter-proposal under Rule 50 filed by taxpayer.
Aug. 13—Hearing held before Mr. Trammell on settlement under Rule 50. Continued Sept. 3, 1930.
Aug. 13—Order entered continuing to Sept. 3, 1930.
Sept. 2—Amended counter proposal Rule 50 filed by taxpayer.
Sept. 3—Hearing held before Mr. Smith, Division 5, on settlement under Rule 50. Contested and argued. Taken under advisement.
Sept. 10—Supplement to amended counter proposal Rule 50 filed by taxpayer.
Sept. 23—Transcript of hearing of Sept. 3, 1930 filed.
Sept. 26—Order that last paragraph of findings of fact be deleted and revised, paragraph be substituted, entered.
Sept. 29—Decision entered, Chas. P. Smith, Division 5.

1931
Jan. 6—Petition for review to U. S. Circuit Court of Appeals, 4th Circuit, with assignments of error filed by taxpayer.
Feb. 28—Certified copy of order granting 60 day extension to prepare and deliver record filed.

Apr. 24—Certified copy of order granting 60 days extension to prepare and deliver record filed.
June 27—Certified copy of order granting 30 day extension to prepare and deliver record filed.
July 11—Copy of order from U. S. Circuit Court of Appeals (4th) to transmit single record to
(3) Court filed.
July 14—Agreed praecipe filed.
July 14—Agreed statement of evidence approved and ordered filed.

(4) Docket No. 25275.

APPEARANCES:

For Petitioner:
Camden R. McAtee, Esq.,

For Respondent:
W. F. Gibbs, Esq.,
M. E. McDowell, Esq.,
F. Schlosser, Esq.

D. J. F. Strother, Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

DOCKET ENTRIES

1927
Mar. 16—Petition received and filed. Taxpayer notified.
Mar. 17—Copy of petition served on General Counsel.
Apr. 29—Motion to join with 10472 for hearing filed by General Counsel.
Apr. 29—Answer filed by General Counsel.
May 2—Copy of answer served on taxpayer—General Calendar.
May 10—Copy of motion served on taxpayer—assigned to 6/27/27.
June 27—Hearing had before Mr. Green on respondents motion to consolidate with 10472—granted.

June 28—Ordered motion be granted, signed and filed. Both sides notified.
Sept. 8—Motion to consolidate for hearing with dockets 18679, 18680, 26655, 26656, 10472, 14516 and 14517 filed by taxpayer. See 18679. Granted.

1928
June 27—Hearing set 9/11/28.
July 19—Motion for a continuance to Oct. 10, 1928 filed by taxpayer. See 18679. Granted 7/23/28.
Oct. 9—Motion for a continuance of 60 days filed by taxpayer. See 14516.
Oct. 11—Motion granted to 12/10/28.
Dec. 6—Motion for a continuance to Feb. 15, 1929 filed by taxpayer. See 18679.
Dec. 8—Motion for a continuance granted to 2/19/29.

1929
Jan. 28—Motion for continuance to 4/15/29 filed by taxpayer—granted.
Mar. 22—Motion for continuance to 5/2/29 filed by taxpayer. See 18679.
May 2 & 3—Hearing had on merits before Wm. R. Green, Division 13. Heard with 14516-17, 10472, 42664 & 32170. Briefs due 90 days from date.
May 20—Transcript of hearing May 2 & 3, 1929 filed.
July 17—Motion for extension of 30 days from Aug. 1, 1929 to file briefs (both parties) filed by General Counsel.
July 19—Motion for extension granted.
Aug. 28—Brief filed by General Counsel. See 10472.
Aug. 31—Motion for extension of 10 days to file brief filed by taxpayer. See 10472.
Sept. 4—Motion granted.
Sept. 10—Requested findings of fact and brief filed by taxpayer.

1930
Jan. 22—Findings of fact and opinion Chas. P. Smith, (5) Div. 5. Judgment will be entered under Rule 50.

Subsequent Docket Entries are identical with those in Docket 10472 as appearing herein, and are here omitted.

(6) Docket No. 32170.

APPEARANCES:

For Petitioner:
Camden R. McAtee, Esq.,

For Respondent:
W. F. Gibbs, Esq.,
F. Schlosser, Esq.,
M. E. McDowell, Esq

D. J. F. Strother, Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

DOCKET ENTRIES

1927
Nov. 5—Petition received and filed. Taxpayer notified (fee paid).
Nov. 5—Copy of petition served on General Counsel.
Nov. 5—Motion to consolidate for hearing with docket 18679 filed by taxpayer. See 18679.
Dec. 22—Answer filed by General Counsel.

1928
Jan. 3—Copy of answer served on taxpayer—assigned to General Calendar.
Oct. 9—Motion for a continuance of 60 days from 10/10/25 filed by taxpayer. See 18679.
Oct. 11—Motion granted to 12/10/28.
Dec. 6—Motion for a continuance to Feb. 15, 1929 filed by taxpayer. See 18679.
Dec. 8—Motion for a continuance granted to 2/19/29.

1929
Mar. 29—Motion for a continuance to May 2, 1929, filed by taxpayer. 3/30/29 granted.

May 2 & 3—Hearing had before Mr. Smith. Heard with 14516-17, 10472, 25275, 42664. Briefs due 90 days from date.
May 20—Transcript of hearing May 2 and 3, 1929 filed.
July 17—Motion for extension of 30 days from Aug. 1, 1929 to file brief (both parties) filed by General Counsel.
July 19—Motion for extension granted.
Aug. 28—Brief filed by General Counsel. See 10472.
Aug. 31—Motion for 10 days extension to file brief filed by taxpayer. See 10472.
Sept. 4—Motion granted.
Sept. 10—Requested findings of fact and brief filed by taxpayer.

1930
Jan. 22—Findings of fact and opinion rendered by Chas. P. Smith, Division 5, judgment will be entered under Rule 50.

Subsequent docket entries are identical with those in Docket 10472 as appearing herein, and are here omitted.

PETITION

(7) Filed Dec. 30, 1925.

UNITED STATES BOARD OF TAX APPEALS

In re: Appeal of
D. J. F. Strother,
Welch, West Virginia.

Docket No. 10472

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter of November 9, 1925, (IT:PA-1-KB-107-60D), and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual, residing at Welch, West Virginia.

2. The deficiency letter was mailed to taxpayer on November 9, 1925, and a copy of same is attached.

3. The taxes in controversy are income taxes for the calendar years 1919, 1920 and 1921, being an aggregate of $3,268.12 and are less than $10,000.

4. A determination of the tax contained in the said deficiency letter is based upon the following errors:

(a) Additions to the income of taxpayer in the several years as follows:

1919	$10,394.50
1920	11,891.30
1921	13,370.26

5. The facts upon which the taxpayer relies as the
(8) basis of his appeal are as follows:

Taxpayers reports upon a cash receipts and disbursements basis. Taxpayer for the several years, was and is an officer and stockholder of the Bankers Pocahontas Coal Company, a corporation at Welch, West Virginia. Taxpayer received from said corporation, distributions in the several years respectively in the amounts above set out. Taxpayer alleges and charges same and each of them are distributions of capital and are not income, and hence are not taxable to taxpayer as income. Before March 1, 1913, said corporation had acquired the fee simple to coal lands in West Virginia, with reference to which, leases were theretofore made and outstanding whereby the lessee obtained and held the right to mine all coal covered by its special lease until exhaustion as a fixed tonnage price per ton, being required to pay a minimum amount each year and entitled thereafter to mine any coal so paid for without additional charge. By said leases the predecessors of said corporation had divested themselves of the coal as said leases are legally in West Virginia sale of coal in place, and the land divested of said coal was and is without value. Said corporation therefore on March 1, 1913 held said leases or choses in action as its sole property of value and any return there-
(9) after, in periodical payments was and is a return of capital and not of income. Consequently, taxpayer receiving such returns by distribution from the taxpayer did not receive taxable income.

6. The taxpayer in support of his appeal, relies upon the following proposition of law:

Any earnings or profits accumulated or increase of value of property acquired before March 1, 1913, may be distributed, exempt from tax.

Taxpayer respectfully prays that this Board may hear and determine his appeal.

(s) CAMDEN R. McATEE,
Counsel for Taxpayer.
MDH

State of West Virginia,
County of , ss:

D. J. F. STROTHER, being duly sworn, states that he has read the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(s) D. J. F. STROTHER.

Subscribed and sworn to before me this 23rd day of December, 1925.

(s) RUBY SLEDGE REYBURN,
(SEAL) Notary Public.

(Commissioned as Ruby Sledge).

(10) Form NP-2

TREASURY DEPARTMENT

(COPY) WASHINGTON

Nov. 9, 1925.

IT:PA:1,
KB-107-60D

Mr. D. J. F. Strother,
Welch, West Virginia.

Sir:

A reaudit of your 1919, 1920 and 1921 income tax returns in connection with the information contained in the report of the Internal Revenue Agent in Charge at Huntington, West Virginia, dated May 10, 1924, together with the data subsequently submitted through correspondence and in conference, and in the recommendation of the Solicitor of Internal Revenue based upon consideration thereof, discloses deficiencies in tax aggregating $3,268.-12, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the in-

closed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1-KB-107-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By (s) C. R. NASH,
Assistant to Commissioner.

Inclosures:
Statements
Agreement—Form A

(COPY) Nov 9, 1925.

IT:PA:1
KB-107-60D

(11) STATEMENT

In re:
Mr. D. J. F. Strother,
Welch, West Virginia:

Year	Deficiency in Tax
1919	$ 963.62 (Waiver)
1920	1,181.02
1921	1,123.48
Total	$3,268.12

The report of the Internal Revenue Agent in Charge at Huntingdon, West Virginia, dated May 10, 1924, has been reviewed and approved by this office.

Due consideration has been given to the information recently submitted in substantiation of your contention relative to the taxability of dividends paid upon shares

of stock assigned to your wife. However, your contention has been denied for the reason that the conditions of the assignment in question operate to defeat the legal right to make an assignment, in that the control and disposition of the income remains at your discretion. This conclusion is based upon consideration of the following statements contained in your affidavit of September 17, 1925.

The assignment and endorsement of the certificates to the wife were made: "With the understanding that the assignee was to have and receive from the assigned stock so much of its returns as together with any other receipts by her would not exceed stock non-taxable to her, and the remaining returns from the stock would and should belong to the affiant.

It is held, therefore, that there has been in effect an assignment of income and not an assignment of principal which the unit has ignored in all cases in which this feature was existent.

All information in substantiation of your contention that the dividends paid by the Bankers Pocahontas Coal Company, during the years 1919, 1920 and 1921 represented a return of capital, therefore non-taxable, has been considered by the Solicitor of Internal Revenue who recommended that the action previously taken by the Income Tax Unit in this matter be sustained for the reason that this Company's earnings since March 1, 1913, were in excess of the dividends paid since that date.

Your wife's returns for the years 1920 and 1921 will (12) be adjusted to give effect to the dividends reported on your returns which have now been considered as taxable income to you, as explained above. No adjustment will be made for the year 1919 on account of the operation of the Statute of Limitations.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

ANSWER

(13) Filed Jan. 21, 1926.

UNITED STATES BOARD OF TAX APPEALS

Appeal of

D. J. F. Strother, Welch, West Virginia. Docket No. 10472.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the taxpayer's petition.

(2) Denies that any errors have been committed in the determination of the deficiency set forth in the deficiency letter.

(3) Admits that the Commissioner has added to taxpayer's income for the years 1919, 1920 and 1921 the amounts indicated in paragraph 4(a) of the taxpayer's petition, but denies that such action is erroneous.

(4) Denies, generally and specifically, each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

PROPOSITION OF LAW

The dividends received by the taxpayer in the amounts and for the years indicated in paragraph 3 of this answer from the Bankers Pocahontas Coal Company out of earnings of such company from its leases of its coal lands executed prior to March 1, 1913, are income within the meaning of Section 213 of the Revenue Acts of 1918 and
(14) 1921 and are not a return of capital as alleged by the taxpayer.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of
Internal Revenue.

Of Counsel:

ELLIS W. MANNING,
Special Attorney,
Bureau of Internal Revenue.

(15) **STATEMENT**

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

v. Docket No. 25275.

Commissioner of Internal Revenue,
Respondent.

The petition and answer are in substance the same as in Docket 10472 and addressed to the same issues herein against adjustments and deficiencies for the calendar years 1922 and 1923, and same are here omitted excepting Paragraphs (b) and (c) of said petition, and the deficiency letter which are as follows:

(b) That respondent Commissioner has ruled that the relation of lessor and lessee existed between said Bankers Pocahontas Coal Company and its operating companies and has allowed to said lessor a depletion rate of .036 per unit, and which allowance was available to said corporation as a deduction in the computation of (16) its taxable net income. That said corporation is not engaged in business, and only receives and makes distribution of payments under the contracts with operating companies aforesaid, and on receipt thereof, distributes same to its stockholders, including this taxpayer, without retaining any part of said receipts. That

thereby in the distributions received by taxpayer in the years 1922 and 1923 was included the depletion allowance to said corporation as non-taxable income and that same is non-taxable when received by this taxpayer, being distribution of a depletion reserve.

(c) That the depletion unit of .036 per unit, allowed by the respondent Commissioner, is erroneous and not a sufficient return of capital interest of said corpora-
(17) tion.

COPY Docket No. 25275.

TREASURY DEPARTMENT

WASHINGTON

IT:PA:4-60D Feb. 26, 1927.
FAL

Mr. D. J. F. Strother,
Welch, West Virginia.

Sir:

An audit of your income tax returns for the years 1922 and 1923, in connection with an examination of your books of account and records discloses an aggregate deficiency in tax amounting to $4,366.82. This deficiency is the result of certain adjustments which are shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed

and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4-60D-FAL. In the event that you acquisce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882.

(18) STATEMENT

IT:PA:4-60D
FAL

Feb. 26, 1927.

In re:

Mr. D. J. F. Strother,
Welch, West Virginia.

Year	Deficiency in Tax
1922	$2,549.05
1923	1,817.77
Total	$4,366.82

The report of the Internal Revenue Agent in Charge at Huntington, West Virginia, dated June 1, 1926, a copy of which was furnished you, has been reviewed and approved by this office as submitted.

You are advised that consideration has been given to your letter of protest dated August 6, 1926, submitted to the Internal Revenue Agent relative to the inclusion in income of dividends received from the Bankers Pocahontas Coal Company but the information submitted is not sufficient to warrant a change in the adjustment as recommended by the agent.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

(19) PRELIMINARY STATEMENT

Index:

Pages covered: 4

Schedules 1 to 4 inclusive.

SUMMARY

Year	Additional Tax
1922	$2,549.05
1923	1,817.77
Total	$4,366.82

Additional tax is due to taxpayer's elimination of dividends of the Bankers Poca. Coal Company. The reason for elimination of dividends is fully explained in previous revenue agent's report of April 24, 1924 and the upholding of his action by the Unit in letter of December 6, 1924. Therefore, same have been added to income for years under examination.

(20) Schedule 1

Year 1922

Net Income

Net income as disclosed by return		$28,293.09
As corrected		44,421.09
Net adjustment		$16,128.00
Unallowable deductions and additional income:		
(a) Dividends	$16,128.00	
Net adjustment as above		$16,128.00

Schedule 1-A

Explanation of Items

(a) Item #7. Dividends reported	$ 2,044.00
Dividends omitted, Bankers Pocahontas Coal Company	16,128.00
Dividends as corrected	$18,172.00

(21) Schedule 2

Year 1922

Computation of Tax

Total net income, (See Schedule 1)		$44,421.09
Income subject to surtax		$44,421.09
Less:		
Exemption	$2,000.00	
Dividends	18,172.00	
Balance		20,172.00
Income subject to normal tax		$24,249.09

Tax at 4% on $4,000.00	$ 160.00	
Tax at 8% on $20,249.09	1,619.93	
Surtax, husband's income	3,784.22	
Total tax		$ 5,564.15
Total tax assessable		5,564.15
Tax previously assessed		3,015.10
Additional to be assessed		$2,549.05

Schedule 3

Year 1923

Net Income

Net income as disclosed by return		$32,787.00
As corrected		46,675.00
Net adjustment		$13,888.00
Unallowable deductions and additional income:		
(a) Dividends	$13,888.00	
Net adjustment as above		$13,888.00

Schedule 3-A

(22) Year 1923

Explanation of Items

(a) Item #7.	
Dividends reported	$ 3,524.00
Dividends omitted, Bankers Pocahontas Coal Company	13,888.00
Dividends as corrected	$17,412.00

Schedule 4

Year 1923.

Computation of Tax

Total net income		$46,675.00
Income subject to surtax		$46,675.00
Less:		
Exemption	$ 2,000.00	
Dividends	17,412.00	
Balance		19,412.00
Income subject to normal tax		$27,263.00
Tax at 4% on $4,000.00	$ 160.00	
Tax at 8% on $23,263.00	1,861.04	
Surtax, husband's income	4,241.75	
Total tax assessable		$6,262.79
Less:		
Credit of 25% per Section 1200, Revenue Act of 1924	$ 1,565.70	
		1,565.70
Net tax assessable		$ 4,697.09
Total tax previously assessed before deducting any credits	$ 3,839.09	
Less:		
Credit of 25% per Section 1200, Revenue Act of 1924	959.77	
Net tax previously assessed		2,879.32
Additional to be assessed		$ 1,817.77

drs-5

(23) **STATEMENT**

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

v. Docket No. 32170.

Commissioner of Internal Revenue,
Respondent.

The petition and answer are in substance the same as in Docket 25275 and addressed to the same issues herein against the adjustments and deficiencies for the calendar years 1924 and 1925, and same are here omitted excepting the deficiency letter, which is as follows:

(24) Docket No. 32170

"EXHIBIT A"

TREASURY DEPARTMENT

WASHINGTON

Office of
Commissioner of Internal Revenue. Oct. 5, 1927.

IT:FAR:C-6
MB-60D

Mr. D. J. F. Strother,
Welch, West Virginia.

Sir:

The determination of your income tax liability for the taxable years 1924 and 1925 as set forth in office letter dated September 12, 1927, discloses an aggregate deficiency in tax of $1,239.56 as shown in the attached statement.

In accordance with the provisions of Section 274 of

the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:C-6-MB* 60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

(s) D. H. BLAIR,
Commissioner.
By (s) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

(25) STATEMENT

IT:FAR:C-6
MB-60D

Oct. 5, 1927.

In re:
Mr. D. J. F. Strother,
Welch, West Virginia.

Year	Deficiency
1924	$ 95.09
1925	1,144.47
Total	$1,239.56

The report of the Internal Revenue Agent in Charge at Huntington, West Virginia dated May 28, 1927, transmitted to this office August 18, 1927, covering an examination of your income tax returns for the years 1924 and 1925 has been reviewed in this office in connection with your protests dated July 20, 1927, and September 16, 1927.

Synopsis of your returns as corrected follow:

1924

Net income reported on return			$18,274.00
Add:			
1. Partnership profits		$ .33	
2. Dividends		16,400.00	
3. Profit on real estate		500.00	
		$16,900.33	
Deduct:			
4. Taxes	$ 55.77		
5. Contribution increased	23.80		
6. Other deduction ($15,000.00 loss in South Fork Coal Company increased to $23,184.00)	8184.00	8,263.57	8,636.76
Adjusted net income			$26,910.76

Explanation of Changes

1. Distributive share of income from the partnership Strother Sale, Curd and Tucker, Welch, West Virginia, (26) increased from $23,883.00 to $23,883.33 to agree with amount shown in report covering examination of return filed by the partnership.

2. Dividends of $16,400.00 received from Bankers Pocahontas Coal Company included as taxable income. Your protest dated September 16, 1927, in which you state that the same issue in prior years is pending a decision of the Board of Tax Appeals has been considered. However, it is necessary to proceed with your case in the usual manner since it cannot be held pending such decision.

3. Profit from sale of real estate which was omitted is included in taxable income.

4. and 5. Amounts checked from your records.

6. In view of information presented in conference August 15, 1927, in the office of the Internal Revenue Agent in Charge Huntington, West Virginia, the entire amount invested in stock of the South Fork Coal Company, $23,184.00 instead of $15,000.00 is considered a loss and allowed. Formal dissolution of the corporation was not considered a requisite in this instance, since it was evident that the stockholders would receive nothing in liquidation.

1925

Net income reported, Line 19		$30,437.00
Add:		
1. Interest	$ 0.31	
2. Partnership income	.68	
3. Dividends	11,920.00	
4. Taxes	9.11	
	$11,930.10	
Deduct:		
5. Contributions	9.08	11,921.02
Adjusted net income		$42,358.02

Explanation of Changes.

1, 4, and 5 checked with records.

2. Distributive share of income from the partnership (27) Strother. Sale, Curd and Tucker increased from $20,960.00 to $20,960.68.

3. See Number 2 of the year 1924 for explanation.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

FINDINGS OF FACT AND OPINION

(28) 18 B. T. A. ----------

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 14516, 14517, 25275, 32170, 42664. Promulgated January 22, 1930.

Royalties received under leases of coal lands are held to constitute gross income and not proceeds from the sale of coal in place.

Money received in compromise of a suit to recover the value of coal extracted by a trespasser, plus damages to the property held, on the record, to constitute taxable income.

Proper depletion rate per ton of coal mined determined.

Camden R. McAtee, Esq., and Wells Goodykoontz, Esq., for the petitioners. M. E. McDowell, Esq., and Frank B. Schlosser, Esq., for the respondent.

These proceedings, consolidated for hearing and de-
(29) cision, involve deficiencies as follows:

Docket No.		
14517	1920	$6,797.56
14516	1921	7,871.64
	1922	4,149.24
	1923	4,113.67
42664	1924	3,362.17
	1925	6,419.04
	1926	7,138.67
10472	1919	863.62
	1920	1,181.02
	1921	1,123.48
25275	1922	2,549.05
	1923	1,817.77
32170	1924	95.09
	1925	1,144.47

In the petitions of Bankers Pocahontas Coal Co. (Docket Nos. 14517, 14516, and 42664), the first contention made is that there is no tax due, upon the ground that the amounts received by the petitioner during the taxable years represented installment payments upon the sales of coal in place, which coal had been sold prior to March 1, 1913.

The second contention is that if the Bankers Pocahontas Coal Co. is to be considered as a lessor, then the amount of depletion which has been allowed to that company has been erroneously computed by the respondent.

For the year 1920, there are two incidental questions which simply amount to the inclusion in 1920 of income which was previously reported for 1919. For 1924, there is an incidental question arising by reason of damages received by the petitioner, the contention being that the (30) amount received as damages to property is not properly includable in gross income.

The contentions in the petitions of D. J. F. Strother (Docket Nos. 10472, 25275, and 32170) are:

(1) That the petitioner received no taxable income when he received distributions from Bankers Pocahontas Coal Co., claimed by the petitioner to be tax-exempt by reason of being distributions of a part of the capital of that company;

(2) That the depreciation rate properly allowable to the Bankers Pocahontas Coal Co., if not properly allowed, has distorted his income;

(3) That the Bankers Pocahontas Coal Co., has made distribution each year of all of its revenues derived from its contracts; that it has accordingly distributed its depletion reserve and that the petitioner should be entitled to an allowance for that depletion reserve in the computation of dividends received from it.

FINDINGS OF FACT

In July, 1912, the Bankers Pocahontas Coal Co., a West Virginia corporation (hereinafter sometimes called the corporation), acquired the fee simple title to approximately 6,200 acres of coal lands, including both the surface and the mineral rights in the State of West Virginia. The land had no appreciable value except for the coal (31) content.

Upon incorporation in 1912, the corporation acquired by formal assignment and has continued to retain the beneficial interest of the original owners in certain contracts affecting the coal content which were executed in 1901 and 1902 with various operating companies and to which contracts the 6,200 acres and coal content were subject.

These contracts were originally prepared by D. J. F. Strother, who at that time was attorney, director, and stockholder in the predecessor corporations. The form of the contracts is that prevailing in the West Virginia coal fields, which followed the Pennsylvania form of contracts as introduced by Pennsylvanians who were largely instrumental in the early coal development in the West Virginia field.

By agreement of parties a copy of such contracts was offered and received in evidence as typical of the several contracts existing on the acreage acquired by the corporation in 1912. The specimen contract provides in part as follows:

This contract of lease, made this 17th day of June, 1901, between the Tug River Coal Land Company, a corporation, authorized and doing business under and by virtue of the laws of the State of West Virginia, party of the first part, hereinafter called the Lessor, and the Cletus Coal and Coke Company, a like corporation, hereinafter called the Lessees.

Witnesseth: First: That in consideration of the terms, conditions and stipulations hereinafter set forth to be performed and observed by the lessees, the Lessor doth demise, let and lease for coal mining and coal coke-ing purposes only, to the lessee, for the period of thirty (30) years, from the 1st day of January, 1901, a certain tract of land situate, lying and being in the County of McDowell and State of West Virginia, on the waters of Tug River containing eight hundred acres, more or less (32) and bounded and described as follows: (Description omitted.)

The Lessor covenants to and with the said Lessee that

it has good right and title to said land, and that the said Lessee shall have quiet, and peaceable enjoyment of the same during the continuance of this lease.

SECOND: The Lessees shall have the sole and exclusive privilege of mining and coking coal on the above described premises and of conducting a general mercantile business thereon during the continuance of this lease, and the privilege of using so much of the surface of said land and so much of the timber, stone, sand, clay and water as may be necessary for the mining, coking and building purposes of said Lessees, but for no other purpose.

* * * * * * *

THIRD: In consideration thereof, the Lessees hereby covenant and agree to pay to the Lessor, its successors and assigns, during the continuance of this lease, as rental for the said premises, the following royalties, to-wit: Ten (10) cents per ton for each and every ton of 2240 pounds of coal mined, dug, carried away from or sold or used on the said premises for any other purpose than the manufacture of coke; and fifteen (15) cents for each and every ton of 2240 pounds of coke manufactured upon the said premises, and sold thereon or therefrom. * * *

* * * * * * *

SEVENTH: The Lessees agree and bind themselves to pay to the Lessors the sum of three thousand dollars for the first year, dating from the 1st day of November, 1901, and the sum of five thousand dollars for each and every year thereafter, during the continuance of this lease, as a minimum rental or royalty for the property herein demised, whether the quantity of coal mined and coke manufactured shall produce that amount of royalty or not, but the Lessees shall have the privilege of mining the next succeeding year, free of royalty, a sufficient amount of coal above the amount necessary to produce the minimum royalty for that year to reimburse themselves for the deficiency in the preceding year. * * *

* * * * * * *

NINTH: The Lessees agree to pay all the taxes that

(33) may be assessed against the demised property and the improvements thereon, or upon the coal mined or coke manufactured, during the continuance of this lease, all other assessments by operation of law whatsoever, when and as the same may become due.

* * * * * * * *

ELEVENTH: At the termination of this lease, otherwise than by forfeiture. all the improvements placed upon the said surface of the demised premises, by the Lessees, shall be valued by two disinterested persons, one to be chosen by each of the parties hereto, and in case of their disagreement, these two shall choose a third, and the persons thus chosen shall value said improvements, and the Lessor shall have the privilege of purchasing said improvements at such valuation, within thirty (30) days after notice thereof. If the Lessor shall not, within said thirty days, accept said improvements, at such valuation, the Lessees shall have the privilege of removing the same from the leased premises within the period of ninety days from the expiration of said thirty days.

TWELFTH: The Lessees shall have the right to at the expiration of the said thirty years, renew this lease, with the terms, stipulations and agreements as herein set forth, provided that they shall have complied with and performed all the conditions, covenants, agreements and stipulations to be *by* them complied with or performed.

THIRTEENTH: It is hereby mutually understood and agreed that the covenants, agreements, stipulations herein contained to be performed by the one party or the other, shall be binding on the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed in their corporate names by their respective presidents, and their corporate seals to be hereunto affixed as of the day and year first above written.

All of these agreements were in the main, with the

exception as to minor and non-essential provisions, the
(34) same as the sample agreement set forth above as the Cletus lease.

From time to time these agreements were reassigned by the lessees to new and different operating lessees, largely with the permission of the lessor corporation.

The cost to the corporation of the properties acquired by it was between $407,000 and $507,000.

The contracts on the property on March 1, 1913, are shown by the following:

SCHEDULE 1

CONTRACTS ON MARCH 1, 1913.

Lessee at 3/1/13	Approximate Acreage	Royalty per ton	Minimum Royalty per annum
Lease			
#1 Vaughan Coal & Coke Co.	1000	8c	$5,000
#2 Superior Pocahontas Coal Co.	1200	10c	5,000
#3 New Pocahontas Coal Co.	1300	7c	4,000
#4 Oregon Coal & Coke Co.	2000	10c	10,000
#5 Pocahontas Smokeless Coal Co.	600	5c	None
#6 J. B. B. Coal Co.	100	1c(haulage)	300

The estimated recoverable tonnage on March 1, 1913,
(35) is shown by the following:

SCHEDULE 2

ESTIMATED RECOVERABLE TONNAGE ON MARCH 1, 1913

Lease #1 Vaughan Coal & Coke Co.	2,416,452

Lease #2	Superior Pocahontas Coal Co.	2,309,444	
Lease #3	New Pocahontas Coal & Coke Co.	3,773,835	
Lease #4	Oregon Coal & Coke Co.	4,906,902	upper or Welch Seam
		22,765,666	lower seam
Lease #5	Pocahontas Smokeless Coal Co.	493,172	
Lease #6	J. B. B. Coal Co.	943,171	
	Total	37,608,642	

The tonnage mined and royalty receipts of the corporation for the years 1913 to 1919, inclusive, is shown by leases as follows:

	Tonnage mined	Royalty Receipts
Lease No. 1	393,379	34,497.20
Lease No. 2	528,255	61,263.41
Lease No. 3	571,502	52,352.49
Lease No. 4	472,980	77,465.45
Lease No. 5	250,601	11,874.92
Lease No. 6	664,991	6,641.15
Total	2,881,708	244,094.62

The tonnage mined, the tonnage paid for, and the royalty receipts for the taxable years involved in these pro-
(36) ceedings are shown by the following:

Lease No. 1—Fall River Pocahontas Collieries Co.

Year	Tonnage mined	Paid for	Receipts
1920	71,594	71,593	5,727.48
1921	98,587	98,587	7,886.98
1922	85,132	85,132	6,810.55
1923	81,373	81,373	6,509.88
1924	95,859	85,859	7,668.72
1925	81,552	81,557	6,524.16
1926	90,764	90,765	7,261.12

Lease No. 2—Superior Pocahontas Coal Co.—Cletus Mine

Year	Tonnage mined	Paid for	Receipts
1920	57,189	120,000	12,000
1921	54,660	120,000	12,000
1922	55,864	120,000	12,000
1923	51,422	120,000	12,000
1924	57,928	120,000	12,000
1925	68,804	120,000	12,000
1926	90,029	120,000	12,000

Lease No. 3—W. E. Deegans (Later New Pocahontas Coal Co. and Monarch Smokeless Coal Co.)

Year	Tonnage mined	Paid for	Royalty rate	Receipts
1920	113,086	113,686	.07	8,372.78
1921	92,983	104,695	.07	7,916.02
1922	141,895	141,895	.07	7,328.66
1923	131,961	131,961	.08	10,556.83
1924	160,428	160,440	.08	12,835.26
1925	151,694	151,619	.08	12,135.57
1926	166,280	164,533	.08	13,162.70

Lease No. 4—Oregon Coal Company (Later Solvay Collieries Company and Kingston Pocahontas Coal
(37) Company).

WARWICK MINE

Year	Tonnage mined	Paid for	Receipts
1920	86,918	100,000	10,000.00
1921	15,297	100,000	10,000.00
1922	109,853	100,002	10,000.02
1923	113,565	113,659	11,365.72
1924	125,811	125,811	12,581.10
1925	91,170	100,000	10,000.00
1926	118,273	118,827	11,827.70

Lease No. 4—Solvay Collieries Company (Later Kingston Pocahontas Coal Co.)

EXETER MINE

Year	Tonnage mined	Paid for	Receipts
1920	19,231	187,500	18,750.00
1921	25,024	306,250	30,625.00
1922	45,483	370,433	37,043.38
1923	74,152	340,782	34,078.20
1924	103,877	343,657	34,365.70
1925	117,792	325,000	32,500.00
1926	153,717	335,115	33,511.56

Lease No. 5—Pocahontas Smokeless Coal Company (Later Central Pocahontas Coal Company.)

Year	Tonnage mined	Paid for	Receipts
1920	27,671	25,758	1,287.88
1921	5,622	4,111	205.57
1922	8,611	8,773	438.65
1923 (Jan.1-Mch.31)	3,877	3,877	193.85

(38) Lease No. 6—Hensley Coal Company (Later known successively as J. B. B. Coal Company, Dexcar Pocahontas Coal Company and Fordson Coal Co.) The payment of 1c per ton ($300.00) minimum per year, is a haulage fee for use of an easement over Bankers Pocahontas property to coal mined on other properties by the operators.

Year	Tonnage mined	Paid for	Receipts
1920	80,506	80,506	805.06
1921	38,990	6,827	68.27
1922	19,811	-----	-----
1923	20,811	15,771	157.71
1924	12,025	12,025	120.25
1925	12,640	12,640	126.40
1926	7,258	51,822	518.22

In the several taxable years in controversy the corporation was upon a cash receipts and disbursements basis of accounting and its income, except minor items not in controversy, consisted of payments received under the several contracts from the various operating companies, and income and profits-tax returns were filed for each of the taxable years and thereafter audited by the Commissioner resulting in the deficiency notice forming the basis of the present proceedings.

In computing the deficiencies the Commissioner considered the relation of the corporation and the operating companies to be that of lessor and lessee and allowed the corporation a depletion deduction of $0.036 per ton mined for the years 1920 to 1926, inclusive, the same depletion rate as was allowed by the Commissioner for 1919 and prior years.

For prior years 1914 to 1919, inclusive, the Commissioner proposed additional taxes in the amount of $6,267.08 and required the corporation to pay same, which (39) thereafter brought an action on February 17, 1923, in the United States Court for the Southern District of West Virginia against the collector to recover same on the grounds that payments under said contracts received by the corporation were the proceeds of a sale of coal in place consummated before March 1, 1913, or of choses in action existing on said date, or that petitioner plaintiff, as a lessor, was entitled to a unit depletion rate of not less than $0.05 per ton mined in the computation of net taxable income, and consequently said taxes were erroneously and illegally assessed and collected. The issues were made in said action, and same were submitted for judgment upon the evidence adduced by the parties, and were decided by opinion of the court and judgment entered thereon that petitioner plaintiff in the computation of said taxes was entitled to a depletion unit of $0.05 per ton instead of $0.036 computed by the Commissioner. A recovery of $5,373.01 from said collector by petitioner plaintiff was adjudged and said judgment was duly paid by the United States. In said action the Bankers Pocahontas Coal Co., one of the petitioners herein, was plaintiff; plaintiff petitioner appearing in its own right and the

collector as defendant, who was defended in said action by the United States District Attorney and the Solicitor of Internal Revenue (now General Counsel). In this proceeding and in said court action the subject matter of the action and of these proceedings is the same, namely, the depletion unit allowable in computing the amount of such depletion deduction as will return to the taxpayer the capital value existing in the coal content of the corpora-
(40) tion's property as of March 1, 1913.

In his computation of invested capital of the corporation for the calendar year 1920 in the deficiency appealed from herein, the Commissioner used the tax computation determined in said action as due and owing for the calendar year 1919, which was based upon the allowance of a $0.05 depletion rate for 1919. In the years subsequent to 1919, the Commissioner has applied the depletion rate of $0.036 per ton. The court action was instituted February 17, 1923, and the judgment therein was entered January 31, 1928. The deficiency letters were mailed for 1920 on February 15, 1926; for 1921, 1922, and 1923 on February 12, 1926; for 1924, 1925, and 1926 on January 15, 1929. Before the issue of the last named deficiency notice the attention of the Commissioner was specifically called to the pendency and decision of the court action.

In the several taxable years, and particularly in 1919, the corporation received its contract payments each month and same when received were about thirty days overdue. The payment for December was consistently reported in the year's receipts, although same did not come to hand until January. In December, 1919, the corporation received a tax refund of $180, which it put on its books in January, 1920, and likewise received a contract payment of $5,434.66. These amounts were reported as income for 1919 and the Commissioner has included same again as 1920 income, as shown by the books to have been received in the latter year.

In 1920, the Flanagan Coal Co., which owned land ad-
(41) jacent to the petitioner corporation, trespassed on the land of the petitioner corporation and removed coal to which it had no right. It then destroyed the entries so that the damage or extent of the operation

could not be determined. The corporation discovered the situation in 1923 and brought suit for damages and, as a result of a compromise of the suit, received in 1924, $3,770.40 in settlement and adjustment of the controversy. The petitioner corporation had no contractual relation with the trespasser and the settlement had no relation to the coal extracted, as the amount of same could not be determined. The Commissioner held the damages received were equivalent to a royalty and adjusted same by the allowance of $0.036 per ton as depletion on 15,000 tons estimated to have been damaged or removed by the trespasser.

In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, received payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them as taxable income. The corporation received said amounts from its operating contracts and entirely distributed them, including any depletion reserve. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion reserve received by him and the Commissioner added the entire receipts to his net income and has determined deficiencies accordingly.

OPINION

Smith: In these proceedings the Bankers Pocahontas (42) Coal Co. contends that it received no income during the taxable years and all of the moneys received as royalties were in part payment of coal in place which had been sold prior to March 1, 1913; that the typical contract quoted in part in the findings of fact constituted a sale of coal in place made before March 1, 1913, under the laws of West Virginia, and that on March 1, 1913, the petitioner held only a chose in action from which no taxable income was subsequently received; that leasing agreements similar to those involved in these proceedings have been held by the courts of Pennsylvania in Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66; 38 L. R. A. 826; Lehigh & Wilkesbarre Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197; and by the courts of West Virginia in Wallace v.

Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; National Coal Co. v. Overholt, 94 S. E. 735 (W. Va.); to constitute sales of coal in place; that the Board is bound to give the same effect to such leasing agreements as has been given to them by the courts of the States of Pennsylvania and West Virginia.

This is the same contention as has been made before the Board in many different cases. Beginning with the case of Nelson Land & Coal Co., 3 B. T. A. 315, and following down through a number of decisions, this Board (43) has uniformly held that sums received as bonus or royalties from leases of oil and mineral rights were not income from the sale or exchange of capital assets, but constituted a part of the gross income that the petitioner was obligated to return as a part of its gross income. It is likewise the same contention which was made before the District Court of the United States for the Southern District of West Virginia in the case of Bankers Pocahontas Coal Co. v. Albert B. White, referred to in our findings, which was a suit for the recovery of additional taxes paid for the years 1914 to 1919. The learned judge of that court disposed of that case in the following language:

This brings on the first contention of the plaintiff, that is, that the plaintiff, by the reserved rentals and royalties, is being paid for the land and the coal thereunder, and that such rentals and royalties are not "income" but "purchase money."

Personally, I believe this statement to be true, but I cannot, in the face of all the decisions, sustain it here.

I therefore hold, that the royalty payments are income, and should pay a tax as such.

Judicial decisions upon the point are many. See Hirschi v. United States, Ct. Cl. , decided May 6, 1929; Berg v. Commissioner, 33 Fed. (2d) 641, certiorari denied 50 S. Ct. 69; Stanton v. Baltic Mining Co., 240 U. S. 103; Von Baumbach v. Sargent Land Co., 242 U. S. 503; United States v. Biwabik Mining Co., 247 U. S. 116. In Hirschi v. United States, supra, the court stated:

The one question involved is whether the income re-
(44) ceived by the plaintiff from said lease is taxable as income from the sale of capital assets or his ordinary income. If it is from the sale of capital assets the plaintiff is entitled to a refund; if it is not, he is not so entitled. Since the decision in Stratton's Independence v. Howbert, 231 U. S. 399, following through Stanton v. Baltic Mining Co., 240 U. S. 103; Von Baumbach v. Sargent Land Co., 242 U. S. 503; United States v. Biwabik Mining Co., 247 U. S. 116, it has been consistently held that the trustees received from such leases of oil and mineral lands were to be treated as gross income. The principle is too well established to require extended discussion.

* * * * * * * * * *

The Federal Government is not limited in its selection of subjects for taxation by the construction of the State courts as to the property rights of individuals, provided the subject taxed was primarily a proper subject for taxation. Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different states. A revenue act is an act of Congress passed in the exercise of its constitutional right, and therefore the supreme law of the land, and where the constitutional powers of the Federal Government and the States conflict those of the States must give way.

Petition for writ of certiorari was denied by the Supreme Court in this case on October 21, 1929.

In Van Devender, 8 B. T. A. 697, contracts in West Virginia made by the petitioner and others from the mining of coal were held to constitute leasing agreements upon the authority of Henry L. Berg and Wife, 6 B. T. A. 1287, and Rosenberger v. McCaughn, 20 Fed. (2d) 139. Counsel for the petitioners suggest, however, that in the Van Devender case the petitioner made the contracts and
(45) that they were not transferred to third parties; that the instant proceedings present the case of such transfer and that if there is any income received from

the contract subject to tax it is ascertained by the exclusion of all capital from same, according to the final decision of Rosenberger v. McCaughn, 25 Fed. (2d) 699. We see no justification for the distinction sought to be made. The Bankers Pocahontas Coal Co. received its property in July, 1912, subject to certain leases upon the property. In our opinion the corporation simply stands in the shoes of the original lessors. The royalties received by it constitute part of its gross income. From such income it is entitled to deduct a reasonable amount for the depletion of its property during the taxable years.

In computing the deficiencies for the years 1920 to 1926, the respondent has used a depletion rate of $0.036 per ton of ore mined each year. The respondent held that this was a reasonable depletion rate and that such rate multiplied by the tons mined each year constituted a reasonable deduction for depletion. The corporation taxpayer contends that this is not a proper rate and that its application does not permit the deduction of a reasonable amount for depletion. In support of its contention it submits the decision of the District Court made in the above cited case of Bankers Pocahontas Coal Co. v. Albert B. White, in which the court found that a reasonable depletion rate was five cents per ton multiplied by the number of tons of ore mined during each taxable (46) year. The evidence before the District Court was introduced before the Board and in addition much additional evidence showing the cost of the properties to the Bankers Pocahontas Coal Co. at the time they were acquired in 1912, and likewise the agreed estimated tonnages in each of the leases upon the land. With respect to the cost of the properties to the petitioner corporation D. J. F. Strother, the president of the corporation, testified as follows:

My recollection is that a bond issue outstanding on the property at that time was either two hundred and forty, or two hundred and sixty thousand dollars; I know I am right in either one amount or the other; we paid out sixty thousand dollars in cash; there were some troubles with the title and we paid on that, at one time, considering this stock at par, $35,000, and we withheld to straighten these titles out, to the Standard Pocahontas

Coal Company, 600 acres of coal, which we valued anywhere from $50,000 to $150,000; we settled two or three other claims, and I do not think I am quite now qualified to speak about, of, I think I have them in my file there, some two thousand dollars more.

This would indicate a cost to the petitioner corporation of from $407,000 to $507,000. The evidence as to the March 1, 1913, value of the property is vague. In 1915, an engineer representing the Old Dominion Trust Co. of Richmond, Va., made a report on the company's property in which he stated that there were approximately 20,000,000 tons of mineable coal at an average value of five cents per net ton making a total value of $1,000,000. On or about December 31, 1917, an account was entered upon the corporation's general ledger debiting coal lands (47) $1,000,000 with the following explanation:

Estimated value as of March 1, 1913 of 6,000 acres coal land said to contain 20,000 tons of coal at five cents per ton.

The income-tax returns filed for those years claimed a March 1, 1913, value for the property of $1,000,000.

In United States v. Ludey, 274 U. S. 295, it was stated:

* * * The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. * * *

* * * * * * * * * *

The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken.

No essential difference is recognized in the decisions of the courts between depreciation and depletion, so far

as the nature of the deduction under the taxing acts involved is concerned. Both are designed to return to the taxpayer the cost or March 1, 1913, value of property depreciated or depleted, whichever is the basis for the computation.

The evidence in the instant proceedings is that there was an estimated quantity of coal in place on March 1, 1913, of 37,608,642 tons. No contention is made anywhere that the March 1, 1913, value of this coal in place was in excess of $1,000,000. The depletion unit used by the respondent in his computation of $0.036 per ton will, (48) upon the exhaustion of the coal deposits, return to the petitioner corporation a total of $1,353,911.11. The depletion rate used by the respondent will therefore return to the petitioner corporation an amount in excess of the greatest claim made by it as to the value of the coal in place at March 1, 1913.

The respondent has determined that a depletion rate of $0.036 per ton is a reasonable rate. The Commissioner's determination of tax liability is prima facie correct. United States v. Rindskopf, 105 U. S. 418; Avery v. Commissioner, 22 Fed. (2d) 6; Brown v. Commissioner, 22 Fed. (2d) 797; Blair v. Roth, 22 Fed. (2d) 932. If the corporation is entitled to a higher rate of depletion than that determined by the respondent the burden is upon the corporation to prove the inadequacy of the depletion rate used by the respondent. We are of the opinion that it has not sustained that burden of proof.

In Docket No. 14517 the Bankers Pocahontas Coal Co. claims that its income for 1920 was overstated by the inclusion therein of royalties in the amount of $5,434.66 and taxes in the amount of $180, which were taxable as income of the year 1919, for which year the amounts were returned as income. The evidence indicates that the books of account show these receipts in 1920. It is contended, however, that the amounts were actually received by the corporation in 1919 and that it was through negligence that the amounts were not deposited in the bank until 1920. The evidence supports such claim. The contentions of the corporation upon this point are there- (49) fore sustained.

In Docket No. 42664 it is contended that a certain receipt of the corporation in 1924, amounting to $3,770.40, from the Flanagan Coal Co., did not constitute a receipt of income. This amount was received in compromise of a suit brought against that company by the petitioner "to recover the value of the coal that had been extracted, plus damages to the plant." At the hearing of these proceedings petitioner's president was asked to relate "the facts briefly out of which the condition arose which resulted in the receipt of that amount of money [$3,770.40] in 1924 by your company." Petitioner's president testified:

The Flanagan Coal Company owned an adjoining piece of land to our land; we discovered that they had mined across our boundary line in a particular seam of coal; I took that up with them and they first said they would pay for it. The matter hung on for some months; this was in 1920 when they had gone in there, at which time the price of coal was very high—anywhere from $6.00 to $15.00 a ton. They did not pay, and when I got my engineers to go down to undertake to measure up how much coal they had gotten out, they found out they had shot in the entries and we could not get in at all, so I brought a suit for damages to the property, and we eventually settled it and we got this $3,770 in 1924, for damage to our property, and that seam of coal I figured and figured over with my engineers as at least $10,000 because they had absolutely destroyed the method of going in on that side of the hill.

He further testified on cross-examination:

We claimed our damages very considerably in excess of that [$3,770.40], but the Flanagan Coal Co. at that time was in a pretty precarious condition financially, and we figured every little bit would help, and we got as (50) much as we could.

The respondent determined that the $3,770.40 in question was a part of the petitioner's gross income; that the trespasser had mined 15,000 tons of coal from the corporation's land; and that the petitioner was entitled to deduct from gross income, in its tax return for 1924, $540 for depletion in respect of the coal removed.

The taxing acts permit the deduction from gross income of losses sustained during the taxable year when not compensated for by insurance or otherwise. (Section 234 (a) (4), Revenue Acts of 1918 and 1921.) If there was a loss sustained by the Bankers Pocahontas Coal Co. as a result of the tortious act of the Flanagan Coal Co., it was sustained in 1920, and the amount of the loss not compensated for by insurance or otherwise is deductible from the gross income of 1920. The evidence does not, however, afford facts from which the amount of the loss may be determined. We do not know what the cost of the coal removed by the trespasser was to the petitioner nor its March 1, 1913, value. If the Banker's Pocahontas Coal Co. is predicting the loss and damage to the property upon the inflated prices of coal in 1920, we think there is no justification for basing a deductible loss upon such inflated values. Joseph E. Hubinger, 13 B. T. A. 960, affirmed by the Circuit Court of Appeals for the Second Circuit December 2, 1929. The deduction of any loss for 1920 must therefore be disallowed for lack of proof of (51) the amount of the loss, if any.

The same situation obtains with respect to the year 1924. The company received from the trespasser $3,770.40. The petitioner has found that all but $540 of this amount (which he has allowed as a deduction from gross income as depletion) constituted taxable income of the company for 1924. The company has submitted no evidence that the cost or March 1, 1913, value of the coal removed by the trespasser was in excess of $540 or that such basis plus damages to the property was in excess of $540. The determination of the Commissioner is therefore sustained for lack of evidence showing error on the part of the respondent. Joseph E. Hubinger, supra.

In Docket No. 14517, with respect to the year 1920, and in Docket No. 14516, with respect to the year 1921, additional error is alleged in the adjustment of surplus and, therefore, in the computation of the petitioner corporation's invested capital. The correctness of the adjustment depends upon the determination of a proper depletion allowance. It therefore follows that, when a proper depletion rate has been determined under the major issue

of the proceedings, the establishment of a proper depletion reserve and, consequently, the proper adjustment of surplus will necessarily follow and be made the subject of appropriate recomputation under the Rule 50 settlement.

With respect to the years 1920 and 1921, the corporation also claims that there has been an improper proration of dividends affecting its invested capital for those years. This raises the question of a tentative tax adjust-
(52) ment such as was involved in L. S. Ayers & Co., 1 B. T. A. 1135. The rule of the Board in L. S. Ayers & Co., supra, should be applied in the recomputation of the deficiencies.

The only issues raised in the three proceedings taken by D. J. F. Strother relate to an overstatement of his income for the years in question resulting from the inclusion therein of the dividends received by him from the corporation. The respondent submits that the determination of the nature of the receipt by the corporation under the leases will also determine the nature of the dividends paid out of its receipt to the stockholder. To the extent that the distribution made by the corporation constitutes a distribution of its depletion reserve the amount received by Strother in nontaxable. Parties are in full accord as to the treatment to be given the individual appeals.

Reviewed by the Board.

Judgment will be entered
under Rule 50.

MOTION FOR REHEARING AND MODIFIED FINDINGS OF FACT AND OPINION

(53) Filed Feb. 27, 1930.

U. S. BOARD OF TAX APPEALS

Bankers Pocahontas Coal Company,
Petitioner,

vs. Docket Nos. 14516-17 and 42664.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472, 25275 and 32170.

Commissioner of Internal Revenue,
Respondent.

Come the petitioners herein, and move the Board to set aside its findings of fact and decision promulgated in the above entitled appeals on January 22, 1930, (providing for a Rule 50 redetermination) and to grant petitioners a rehearing, or modified findings of fact and opinion herein, for cause:

1. That the Board erred in including in said findings of fact, statements concerning the contracts upon the property, the estimated recoveries of coal tonnage on March 1, 1913, and the tonnage mined and royalty receipts from each of the several leases; which said evidence was offered at the hearing (record p. 124) by stipulation of parties only for purposes of any computation under Rule 50, and which said evidence was not introduced nor available as the basis of any findings of fact in reference to the issues between the parties herein.

2. Petitioners move to strike from said findings of fact, the sentence "the cose to the corporation of the

properties acquired by it was between $407,000 and $507,-000", because said evidence was irrelevant and incompetent, and was received over the objections of petitioners.

3. That the Board erred in its conclusion of law that the agreements herein between the corporate petitioner and operating companies should not be held to be sales of coal in place, being the legal construction admitted to attach to said agreements under the laws of West Virginia.

4. That the Board erred in setting forth evidence in its opinion, concerning the value of the property on March 1, 1913, which evidence is not set forth in its findings of fact.

5. That the Board erred in not including in its find-
(54) ings of fact, that amount of the depletion allowable to the corporate petitioner is res adjudicata herein under the decision of Bankers Pocahontas Coal Co. vs. Albert White, Collector, and, also, under its findings of fact that the subject matter of said decision and the parties therein are identical with those involved in the present proceedings.

6. That the Board erred in stating in its opinion additional evidence as to the cost of the properties was introduced and also regarding the estimated tonnages in each of the leases; it appearing said evidence was taken over the objections of petitioners upon cross examination by respondent, and otherwise was introduced subject to stipulation only for purposes of a Rule 50 computation.

7. That the Board erred in holding the damages recovered from the Flanagan Coal Company constitute a recovery of the value of coal mined, subject to allowance for depletion, as contradictory to its findings of fact thereon.

8. That the Board having erred as aforesaid, in its decision of the Bankers Pocahontas Coal Company appeal likewise erred in applying its principles to decision of the appeals of petitioner Strother.

And, it appearing this decision was reviewed by the Board, Petitioners request that this motion for rehearing and modification be reheard by the Board.

(s) CAMDEN R. McATEE,
Attorney for Petitioners.

(55) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 14516, 14517, 42664, 10472, 25275, 32170.

Counsel for petitioners in the above entitled proceedings having filed a motion with the Board on February 27, 1930, for a rehearing or for modified findings of fact and opinion as set forth in the report promulgated January 22, 1930, alleging that the Board erred in including in said findings of fact certain data contained in a stipulation which counsel now claims was introduced solely for purposes of any recomputation under Rule 50; that a certain finding of fact be stricken from the report on the ground that the evidence supporting said finding of fact was irrelevant, incompetent, and received over objection of counsel for petitioners; that the Board erred in several conclusions of law as set forth in its opinion and in not including in its findings of fact a certain other conclusion of law to the effect that the amount of allowable depletion is res adjudicata; that the Board

erred in setting forth certain evidence in its opinion, and the premises considered and due consideration having been given thereto as well as to statements of counsel for the petitioners at the hearing in the above entitled proceedings and to his then position with respect to the matters presently complained of, and after reconsideration of the record herein, it is

ORDERED that the motion be and the same is hereby denied.

(Signed) CHARLES P. SMITH
Member,
United States Board of Tax Appeals.

Washington, D. C.

Entered: March 6, 1930.

CPS:aa.

NOTICE OF SETTLEMENT

(56) Filed Mar. 31, 1930.

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

v. Docket Nos. 10472-25275-32170

Commissioner of Internal Revenue, Respondent.

The annexed proposed determination of deficiency under the opinion of the Board of Tax Appeals heretofore rendered herein will be presented to the Board for settlement on the .... day of ..... 1929, at 9.30 A. M.

This notice of proposed determination is submitted in accordance with the decision of the Board without prejudice to the Commissioner's right to contest the correct-

ness of the decision pursuant to the statute in such cases made and provided.

(Signed) C. M. CHAREST
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

MAXWELL E. McDOWELL,
FRANK B. SCHLOSSER,
Special Attorneys,
Bureau of Internal Revenue.

(57) STATEMENT

IT:AR:F-6
LGS

In re: D. J. F. Strother,
Welch, West Virginia.

Docket Nos. 10472-25275-32170.

Years	Additional Tax	Over Assessment
1919	$ 404.83	
1920	145.87	
1921	536.04	
1922	2,188.61	
1923	1,670.74	
1924		$ 36.38
1925	860.02	
Totals	$5,806.11	$ 36.38

Net additional tax $5,769.73

1919

Net income, 60-day letter			$23,203.28
Deduct:			
Dividends received from Bankers Pocahontas Coal Co., 60-day letter		$11,372.50	
Correct amount taxable Board's decision		4,762.69	6,609.81
Net income adjusted			$16,593.47
Less:			
Exemption	$2,000.00		
Dividends	6,485.69		
Interest United States obligations	189.98		8,675.67
Income subject to normal tax			$7,917.80
4% on $4,000.00		$160.00	
8% on $3,917.80		313.42	$ 473.42
Surtax on $16,593.47			$ 451.54
Tax liability			$ 924.96
Previously assessed			520.13
Additional tax			$ 404.83

(58) 1920

Net income, 60-day letter			$30,728.86
Deduct:			
Dividends received from Bankers Pocahontas Coal Co., 60-day letter		$16,110.00	
Correct amount taxable Board's decision		7,235.48	8,874.52
Net income adjusted			$21,854.34

Less:			
Exemption	$2,000.00		
Dividends	9,291.48		
Interest United States obligations	332.50		11,623.98
Income subject to normal tax			$10,230.36
4% on $4,000.00		$160.00	
8% on $6,230.36		498.43	$ 658.43
Surtax on $21,854.34			876.89
Tax liability			$1,535.32
Previously assessed			1,389.45
Additional tax			$ $145.87

1921

Net income, 60-day letter			$27,031.14
Deduct:			
Dividends received from Bankers Pocahontas Coal Co.,			
60-day letter		$16,112.50	
Board's decision		10,595.74	5,516.76
Net income adjusted			$21,514.38
Less:			
Exemption	$2,000.00		
Dividends	13,403.74		15,403.74
Income subject to normal tax			$ 6,110.64
4% on $4,000.00		$160.00	
8% on $2,110.64		168.85	$ 328.85
Surtax on $21,514.38			846.30
Tax liability			$ 1,175.15
Previously assessed			639.11
Additional tax			$ 536.04

(59)

	1922		
Net income, 60-day letter			$44,421.09
Deduct:			
Dividends received from Bankers Pocahontas Coal Co.,			
60-day letter		$16,128.00	
Board's decision		14,253.12	1,874.88
Net income adjusted			$42,546.21
Less:			
Exemption	$2,000.00		
Dividends	16,297.12		18,297.12
Income subject to normal tax			$24,249.09
4% on $4,000.00		$160.00	
8% on $20,249.09		1,619.93	$ 1,779.93
Surtax on $42,546.21			3,423.78
Tax liability			$ 5,203.71
Previously assessed			3,015.10
Additional tax			$ 2,188.61
	1923		
Net income, 60-day letter			$46,675.00
Deduct:			
Dividends received from Bankers Pocahontas Coal Co.,			
60-day letter		$13,888.00	
Board's decision		12,941.53	946.47
Net income adjusted			$45,728.53
Less:			
Exemption	$2,000.00		
Dividends	16,465.53		18,465.53
Income subject to normal tax			$27,263.00

4% on $4,000.00		$ 160.00	
8% on $23,263.00		1,861.04	$ 2,021.04
Surtax on $45,728.53			4,045.71
Total			$ 6,066.75
Less:			
Credit of 25%—Sec. 1200, Revenue Act of 1924			1,516.69
Tax liabilty			$ 4,550.06
(60)			
Previously assessed		$3,839.09	
Less:			
Credit of 25%, Sec. 1200, Revenue Act of 1924		959.77	2,879.32
Additional tax			$1,670.74

1924

Net income, 60-day letter			$26,910.76
Deduct:			
Dividends received from Bankers Pocahontas Coal Co.,			
60-day letter		$16,400.00	
Board's decision		14,651.92	1,748.08
Net income adjusted			$25,162.68
Less:			
Exemption	$2,500.00		
Dividends	17,611.92		20,111.92
Income subject to normal tax			$ 5,050.76

2% on $4,000.00	$80.00	
4% on $1,050.76	42.03	$ 122.03
Surtax on $25,162.68		521.39
Total		$ 643.42
Earned income credit		55.00
Tax liability		$ 588.42
Previously assessed		624.80
Overassessment		$ 36.38

1925

Net income, 60-day letter			$42,358.02
Deduct:			
Dividends received from Bankers Pocahontas Coal Co.,			
60-day letter		$11,920.00	
Board's decision		9,311.31	2,608.69
(61) Net income adjusted			$39,749.33
Less:			
Exemption	$3,500.00		
Dividends	14,429.31		17,929.31
Income subject to normal tax			$21,820.02
1½% on $4,000.00		$ 60.00	
3% on $4,000.00		120.00	
5% on $13,820.02		691.00	$ 871.00
Surtax on $39,749.33			1,774.93
Total			$2,645.93
Earned income credit			206.25
Tax liability			$2,439.68
Previously assessed			1,579.66
Additional tax			$ 860.02

(62) STATEMENT OF ACCOUNT

IT:AR:F-6
LGS

In re: D. J. F. Strother,
Welch, West Virginia.

Docket Nos. 10472-25275-32170.

1924

Original tax assessed #90241	$624.80
Tax paid	$624.80
Tax liability	588.42
Overpayment	$ 36.38

(63) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Washington

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 25275, 32170.

Pursuant to the Board's findings of fact and opinion promulgated in the above entitled proceedings January 22, 1930, counsel for the respondent filed a notice of settlement on March 31, 1930. At the hearing under Rule 50, on June 18, 1930, counsel for the petitioner moved that the entry of judgment in these proceedings be continued until the Board should have disposed of certain contentions made by counsel for the petitioner with respect to the proceedings involving Bankers Pocahontas Coal Co., Docket Nos. 14516, 14517, and

42664. Counsel for the respondent interposed no objections to the granting of the motion. Wherefore, it is—

ORDERED that the hearing under Rule 50 involving Docket Nos. 10472, 25275, and 32170 be continued and placed on the Day Calendar for hearing on August 13, 1930.

(Signed) CHARLES P. SMITH,
Member,
United States Board of Tax Appeals.

Entered: July 15, 1930.

CPS:aa.

OBJECTIONS AND COUNTER PROPOSAL AS RULE 50 SETTLEMENT OFFERED BY PETITIONER

(64) Filed Aug. 12, 1930

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472, 25275, 32170

Commissioner of Internal Revenue, Respondent.

Respondent having filed its Rule 50 proposal for tax determination herein based upon Board opinion and proposal in Nos. 14516, 14517 and 42664, Bankers Pocahontas Coal Company vs. Commissioner, and consideration thereof being continued by Board order of July 15, 1930 to August 13, 1930 and until after contentions in said Bankers case were to be disposed of by the Board,

Comes petitioner by his attorney, and objects to the proposed settlement herein and offers a proposed counter determination for cause as follows:

1. Petitioner is a stockholder in said Bankers Poca-

hontas Coal Company, which is upon a cash receipt basis and distributing its entire income in the several (65) years, and derives material income therefrom as dividends.

2. The Board has determined allowable depletion in the several years to said Bankers company is computed upon tonnage mined and not upon tonnage paid for; that said unit is .036 per ton, and not .05 per ton as determined by alleged res adjudicata proceedings, and that payments to said Bankers company under the operating contracts are royalties subject to depletion allowances, and not proceeds of sale of coal, and thereby has denied contentions of said Bankers company, which are material to determination of the tax liability of petitioner, and petitioner expressly reserves the right hereafter to contest said several rulings in the Bankers case as affecting his own tax liability in each and all years to which same are applicable.

3. Petitioner states the depletion allowances made to the Bankers Company are each erroneous as to amount and determination on tonnage mined, and said errors are reflected in use of same in computing his tax liability in the proposal of respondent.

4. Petitioner states the Bankers opinion states distributed depletion reserve is non taxable to Strother (66) but same is not shown in respondent's computation.

5. That in said computation Bankers dividends to petitioner are shown in varying amounts for each year from 1919 to 1925 inclusive and the exclusion of a less amount of dividends than received for the years 1919, 1920 and 1921 is shown in the computation of net income subject to normal tax, and petitioner has no certainty of the computation for succeeding years.

6. That so-called correct amounts of said dividends taxable under the Bankers decision to petitioner are shown for the several years but no method of deriving same or establishing the items is given, and petitioner objects to the statement or computation of net income

thereby obtained as insufficient to establish a tax liability herein.

7. The stockholding of petitioner being 454.50 shares of 1500 shares outstanding or 30.3% and respondent not having eliminated receipt of depreciation reserve distributed, petitioner amends the computation of respondent as to dividends excluded for normal taxes and said reserve and restates the tax liability thereby as follows:

(67) 1919

Adjusted net income			$16,593.47
Less 30.3% of $..... depletion			$.....
Corrected net income			$.....
Less exemption	$ 2,000.00		
	11,372.50		
Dividends	$.....		
U. S. Int.		189.98	$.....
Income subject to normal tax			$.....
4% on $4,000		$.....	
8% on $.....		$.....	
Surtax on $.....		$.....	$.....
Tax liability			$.....
Previously assessed			$.....
Additional Tax			$.....

Insertion of depletion allowed necessary to complete figures.

1920

Adjusted net income			$21,854.34
Less 30.3% of $16,423.02			4,931.83
Corrected net income			$17,922.51
Less Exemption		$2,000.00	
Dividends	$16,110.00 4,931.83	11,178.17	
U. S. Int.		332.50	13,510.67
Income subject to normal tax			$ 4,411.84
4% on $4,000.00		160.00	
8% on 411.84		32.85	192.85
Surtax $17,922.51		$410.00 134.58	544.58
Tax Liability			$ 737.43
Assessed			1,389.45
Overassessment			$ 652.02

(68) 1921

Adjusted Net Income			$21,514.38
Less 30.3% of $11,921.87			3,618.27
Corrected net income			$17,896.11
Less Exemption		$2,000.00	
Dividends	$16,110.00 3,618.27	12,491.73	14,291.73
Subject to normal tax			$ 3,604.38
4% on	$3,604.38	$144.18	
Surtax on	$17,896.11	542.73	
Total tax			$ 686.91
Assessed			639.11
Additional			$ 47.80

1922

Adjusted net income			$42,546.21
Less 30.3% of $16,799.36			5,090.21
Corrected net income			$37,456.00
Less Exemption		$ 2,000.00	
	$16,297.12		
	5,090.21	11,206.91	13,206.91
Income subject to normal tax			$24,249.09
4% on $4,000		$ 160.00	
8% on $20,249.09		1,619.39	$1,779.39
Surtax on $37,456.00			2,532.96
Tax liability			$ 4,312.35
Assessed			3,015.61
Additional			$1,296.74

(69) 1923

Net Income adjusted			$45,728.53
Less 30.3% of $17,177.79			5,204.87
Corrected net income			$40,523.66
Less exemption		$2,000.00	
	16,465.53		
Dividends	5,204.87	11,260.66	13,260.66
Income subject to normal tax			$27,263.00
4% on $4,000.00		$ 160.00	
8% on $23,263		1,861.04	$2,021.04
Surtax on $40,523.66			3,054.26
			$5,075.30
Less 25% cr.			1,268.82
			$3,806.48
Assessed	$3,839.09		
25%	959.77		2,879.32
Additional			$ 927.16

1924

Adjusted Net income			$25,162.68
Less 30.3% of $20,553.41			6,227.68
Corrected net income			$18,935.00
Less Exemption		$2,000.00	
	$17,611.92		
	6,227.68	11,383.24	13,383.24
Income subject to normal tax			$ 4,551.76
2% on $4,000	$80.00		
4% on $551.76	22.07	$102.07	
Surtax on $18,935.00		177.40	
		$279.47	
Earned Income credit		55.00	
Tax liability		$224.47	
Assessed		624.80	
Overassessment		$400.33	

(70) 1925

Adjusted Net Income			$39,749.33
Less 30.3% of $18,851.47			5,712.10
Corrected net income			$34,037.23
Less exemption		$3,500.00	
	$14,429.31		
Dividends	5,712.10	8,717.21	12,217.21
Subject to normal tax			$21,820.02
1½% on $4,000	$ 60.00		
3% on $4,000	120.00		
5% on $13,820.02	691.00		871.00
Surtax on $34,037.23			1,324.10
Total tax liability			$2,195.10
Assessed			1,579.66
Additional			$ 615.44

Summary

Year	Respondent		Petitioner		
1919	Add $ 404.83		Not figured		
1920	Add 145.87		Over		$ 652.02
1921	Add 536.04		Add	$ 47.80	
1922	2,188.61		Add	1296.74	
1923	1,670.74		Add	927.16	
1924	Over	$36.38	Over		400.33
1925	860.02		Add	615.44	
	$5,806.11			$2,897.14	
	36.38			1,052.33	
Net add	$5,769.73			$1,844.81	$1,052.33

(71) In petitioner's computation the adjustment for depletion reserve follows the Bankers decision that same is computed on coal mined. This leads to error as dividends were further received based on coal paid for and such payment includes a depletable or depreciable capital return of the value of the contract or commodity, which capital receipt by petitioner cannot be eliminated in the computation of his net income under the Board method.

Petitioner submits the foregoing tentative computation without prejudice to and reserving his right to further contest same as provided by law.

(s) CAMDEN R. McATEE,
Attorney for Petitioner.

PETITIONER'S AMENDED COUNTER RULE 50 PROPOSAL

(72) Filed Sept. 2, 1930.

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472
25275
32170

Commissioner of Internal Revenue,
Respondent.

For amended objections and counter Rule 50 proposal, petitioner D. J. F. Strother respectfully shows the Board as to the proposed determination for the several years.

(a) The findings of fact are that the Bankers Pocahontas Coal Company in the several years received amounts from its operating contracts and entirely distributed them including any depletion reserve to its stockholders including this petitioner, and that respondent made this petitioner no allowance for any depletion reserve. The opinion is that to the extent the distributions of the corporation are non-taxable the amounts received by this petitioner are non-taxable.

(b) In the several years this petitioner held 30.3%
(73) of the capital stock of petitioner and is thereby entitled to a non-taxable allowance as follows:

	Total Depletion	Allowable Strother	Allowed Strother
1919	$--------	$-------	$6,609.81
1920	16,423.02	4,931.83	8,874.52
1921	11,921.87	3,618.27	5,516.76
1922	16,799.36	5,090.21	1,874.88
1923	17,177.79	5,204.87	946.47
1924	20,553.41	6,227.68	1,748.08
1925	18.851.47	5,712.10	2,608.69

Adjusting the proposed determination of respondent to all depletion reserves and thereby correct dividend adjustments for normal taxes, we have the following computation:

1919—Not computed as special depletion not available.

1920

Net Income			$30,728.86
Bankers dividends		$16,110.00	
Depletion reserve adjustment		11,781.17	4,931.83
For surtax Taxable net income			$25,797.83
Less:	$ 2,000.00		
	13,837.17		
	332.50		16,169.67
For normal tax			$ 9,626.16
(74) 4% on $4,000			$ 160.00
8% on $5,626.16			450.09
Surtax $25,797.83			1,387.76
Tax liability			$1,997.85
Assessed			1,389.45
Add			$ 608.40

1921

Net Income			$27,031.14
Bankers Dividends		$16,112.50	
Depletion reserve adjustment		12,494.23	3,618.27
For surtax Taxable net income,			$23,412.87
Less:		$ 2,000.00	
		15,302.23	17,302.23
For normal tax			$ 5,110.64

4% on $4,000		$ 160.00
8% on $1,110.64		88.85
Surtax on $23,412.87		1,031.28
Tax liability		$1,280.13
Assessed		639.11
Add.		$ 641.02

(75) 1922

Net Income		$44,421.09
Bankers Dividends	$16,128.00	
Depletion reserve adjustment	11,027.79	5,090.21
For surtax Taxable net income		$39,330.88
Less:	$ 2,000.00	
	14,651.79	16,651.79
For normal tax		$22,679.09
4% on $4,000		$ 160.00
8% on $18,679.09		1,494.32
Surtax $39,330.88		2,856.24
Total		$4,510.56
Assessed		3,015.10
Add.		$ 1,395.46

1923

Net income		$46,675.00
Bankers Dividends	$13,888.00	
Depletion reserve adjustment	8,683.13	5,204.87
For surtax Taxable net income		$41,470.13

Less:	$ 2,000.00	
	12,207.13	14,207.13
For normal tax		$27,263.00
4% on $4,000		$ 160.00
8% on $27,263.00		2,181.04
Surtax $41,470.13		3,224.62
Total		$ 5,565.66
Less 25 cr.		1,391.41
Liability		$ 4,174.25
Assessed	$ 3,839.09	
Less 25%	959.77	2,879.32
Additional		$ 1,294.93

(76) 1924

Net income		$26,910.76
Bankers Dividends	$16,400.00	
Depletion reserve adjustment	10,172.32	6,227.68
For surtax Taxable net income		$20,683.08
Less:	$ 2,500.00	
	13,132.32	15,632.32
For normal tax		$ 5,050.76
2% on $4,000		$ 80.00
4% on $1,050.76		42.03
Surtax $20,683.08		254.15
		$376.18
Earned Income Credit		55.00

Liability		$ 321.18
Assessed		624.80
Over.		$ 303.62

1925

Net Income		$42,358.02
Bankers Dividends, Depletion reserve adjustment		5,712.10
For surtax, Taxable net income		$36,645.92
Less:	$ 3,500.00	
	21,325.90	24,825.90
For normal tax		$11,820.02
1½% on $4,000	$ 60.00	
3% on $4,000	120.00	
5% on $3,820.02	191.00	
		$ 371.00
Surtax on $36,645.92		1,617.50
		$ 1,988.50
Credit		206.25
Liability		$ 1,782.25
Assessed		1,579.66
Add.		$ 202.59

(77) Summary:

1920	$ 608.40	
1921	641.02	
1922	1,395.46	
1923	1,294.93	
1924		$ 303.62
1925	202.59	
	$ 4,142.40	
	303.62	
	$ 3,838.78	

Petitioner submits the foregoing amended tentative computation without prejudice to and reserving his right to further contest same as provided by law.

(s) CAMDEN R. McATEE,
Attorney for Petitioner.

SUPPLEMENT TO PETITIONER'S AMENDED COUNTER RULE 50 PROPOSAL

(78) Filed Sept. 10, 1930.

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472, 25275, 32170

Commissioner of Internal Revenue, Respondent.

Petitioner herewith supplies his 1919 tax computation, omitted from the original amended counter proposal as follows:

1919

Net Income		$23,203.28
Bankers Dividends	$11,372.50	
Depletion Reserve Adjustment	3,592.25	7,780.25
For Surtax Taxable Net Income		$15,423.03
Less	$2,000.00	
	5,315.25	
	189.98	7,505.23
For Normal Tax (same as respondent)		$ 7,917.80
Normal Tax		473.42
Surtax on $15,423.03		375.38
		$ 848.80
Previously assessed		520.13
Additional		$ 328.67

CAMDEN R. McATEE,
Attorney for Petitioner.

(79) **ORDER**

UNITED STATES BOARD OF TAX APPEALS

Bankers Pocahontas Coal Co.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 14516, 14517, 25275, 32170, 42664.

It appearing as a result of a hearing on the notice of settlement of the deficiencies of D. J. F. Strother, Docket Nos. 10472, 25275, and 32170, that there is an error in the last paragraph of the findings of fact of the Board, promulgated January 22, 1930, 18 B. T. A. 901, it is

ORDERED that the last paragraph of said findings of fact be deleted and that there be substituted therefor the following paragraph:

In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, received payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them as taxable income. The corporation received the royalties of the contracts, used such portion as was necessary for payment of the ordinary and necessary expenses of administering business, set aside a certain reserve to meet pending Federal taxes and distributed the rest to the stockholders. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion reserve received by him and the Commissioner added the entire receipts to his net income and has determined deficiencies accordingly.

(Signed) CHARLES P. SMITH,
Member, United States
Board of Tax Appeals.

Washington, D. C.,

Entered September 26, 1930.

(80) **DECISION**

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket Nos. 10472, 25275, 32170.

Pursuant to the findings of fact and opinion of the Board, promulgated in the above entitled proceeding under date of January 22, 1930, the respondent, on March 31, 1930, filed a notice of settlement in which deficiencies were recomputed for the years 1919 to 1925, inclusive. On September 2, 1930, the petitioner filed an alternative notice of settlement showing deficiencies differently from those determined by the respondent. After hearing thereon on September 3, 1930, and after considering arguments of counsel, the redeterminations of the respondent are found to be in accordance with the findings of fact and opinion promulgated by the Board on January 22, 1930. Wherefore, it is

ORDERED and DECIDED that there are deficiencies in income tax for the years 1919, 1920, 1921, 1922, 1923, and 1925 of $404.83, $145.87, $536.04, $2,188.61, $1,670.74, and $860.02, respectively, and that there is an overassessment for 1924 to be abated in the amount of $36.38.

(Signed) CHARLES P. SMITH,
Member, United States
Board of Tax Appeals.

Washington, D. C.,

Entered Sep. 29, 1930.

PETITION FOR REVIEW

(81) Filed Jan. 6, 1931.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES
FOURTH CIRCUIT

D. J. F. Strother, Appellant,

vs. Docket No.-----

Commissioner of Internal Revenue,
Appellee.

Petitioner appellant, D. J. F. Strother, being aggrieved by a deicsion of the United States Board of Tax Appeals, (hereinafter called "the Board"), determining additional income taxes of $5,706.11 and legal interest for the calendar years 1919 to 1925, inclusive, as entered on September 29, 1930, in the appeal of D. J. F. Strother vs. Commissioner of Internal Revenue, Nos. 10472, 25275 and 32170 (consolidated) on the docket of said Board, hereby respectfully submits his petition for review thereof by this Court, and for cause in support thereof, states (82) as follows:

1. Now and at the times hereinafter mentioned, petitioner appellant was and is a citizen of the United States and resident of the State of West Virginia, within the jurisdiction of this Court, and prosecutes this proceeding in his own right, pursuant to Sections 1001-2 of the Revenue Act of 1926. Appellee is the duly appointed and qualified Commissioner of Internal Revenue, and is joined herein as a party in his official capacity.

2. For the calendar years 1919 to 1925, inclusive, this appellant made and filed his income tax returns to disclose the gross income and the deductions of credit against same allowed by the several Revenue Acts as computed upon a cash receipts and disbursements basis, and to permit assessments of tax upon the resulting income, if any, and paid any tax shown thereby for each of the said taxable years.

3. In each of said taxable years the major portion of the gross income of appellant, and which is here in controversy, consisted of the dividends received from the Bankers Pocahontas Coal Company, (hereinafter called the "Bankers Company"), a corporation owning certain West Virginia coal lands and certain contracts thereon, (83) whereby operating companies paid money payments each year to said Bankers Company for the mining and taking by them of coal from said lands; and which contracts were executed and existing before and continuous since March 1, 1913, during which time appellant has been a stockholder and officer of said Bankers Company. As appellant is advised, said Bankers Company likewise made its income tax returns for the

several years aforesaid, and therein did not report said money receipts as any part of the taxable net income, for cause, that said Bankers Company claimed and alleged the money payments were the proceeds of sales of coal in place affected and determined by said contracts before March 1, 1913 and thereafter continued, and thereby not subject to income tax. In his several returns, this appellant likewise disclosed the receipt of said dividends received by him each year from the Bankers Company, but did not report same as income subject to tax, for cause that, appellant likewise claimed said payments were not taxable income.

4. Upon review and examination of said returns of appellant, the appellee, Commissioner of Internal Revenue, having ruled the money payments to the Bankers Company in the several years constituted payments of royalties by lessees to a lessor, and were taxable to the (84) Bankers Company in the several years received to the extent that said receipts exceeded any return of capital therein received, further ruled the dividends paid to this appellant by the Bankers Company were taxable, and did not exclude therefrom as non-taxable any depletion reserve distribution received by this appellant in said dividends. The taxable net income reported by this appellant in his several returns was accordingly adjusted and increased, and the resulting deficiencies in tax were proposed against appellant by official letters from the appellee Commissioner.

5. Whereupon, within the time and as allowed by law, this appellant, alleging error of law and fact therein, on the part of appellee Commissioner, appealed to said Board from said official findings as to each of said adjustments and the resulting tax proposals, praying a redetermination thereof, and issue was joined on said appeals by answer filed by the appellee Commissioner.

6. At the hearing of said appeals by the Board on May 3, 1929, by agreement, same were consolidated and heard with appeals of the Bankers Company, a corporation, in which this appellant was and is an officer and stockholder and from which the sums in controversy (85) were received by appellant as dividends. It ap-

peared in said hearing the determination of the issues of said appeals of Bankers Company would substantially decide the issues made in the appeals of this appellant, and the evidence and proceedings in said Bankers appeals were by consent of parties considered as read into the appeals of this appellant.

The evidence so read related to the issues in the Bankers Company appeals as to whether its money payments under certain contracts constituted non taxable income as the proceeds of sales of coal in place accomplished before March 1, 1913, or were royalties payable by lessees to their lessor, and the proper rate of depletion allowable to the lessor in the latter event.

In addition thereto, this appellant testified as an officer of the Bankers Pocahontas Coal Company all such money receipts were distributed each year after deduction of nominal administration expenses, and including any depletion reserve, excepting that an amount was being withheld sufficient for payment of the proposed tax deficiencies asserted and in controversy, and which amount will be distributed to the stockholders if no lia-
(86) bility therefor is established. Appellant further testified individually the Bankers dividends received by him were disclosed but not reported as taxable income in his returns for the several years, and that appellee Commissioner had included same in his taxable net income without any allowance for depletion reserves therein included, and which constitute non-taxable income to appellant not to be so included.

7. Thereafter the findings of fact and decision of the Board promulgated on January 22, 1930 approved the determination of appellee Commissioner that the aforesaid money payments to the Bankers Company were royalties of a lessor subject to allowance for depletion of the property from which derived and that the rate of 3.6 cents per ton of coal mined was a reasonable depletion deduction in the several years, and as to this appellant made the following finding of fact:

"In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, re-

ceived payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them as taxable income. The corporation received said amounts from its operating contracts and entirely distributed them, including any depletion reserve. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion reserve received by him and (87) the Commissioner added the entire receipts to his net income and has determined deficiencies accordingly."

8. A proposed determination of tax of appellant pursuant thereto being offered by appellee Commissioner, this appellant filed his objections and original and amended counter-proposal, and the parties were heard. It appeared the proposal of appellee Commissioner ascertained the average daily net income of the Bankers Company for each year exclusive of depletion allowances and by comparison of the average net income earned on dividend dates assumed to ascertain the parts of dividends accordingly allocable to earnings and to capital, and thereby the receipts of earnings and capital by this appellant in his individual dividend receipts, whereby the total capital distributions of the Bankers Company did not accord with the deductible depletion, and on the contrary were about $30,000 less than same for all the years in controversy, and which difference appellee Commissioner assumed to explain as equivalent to any amounts retained against the proposed tax liability of the Bankers Company in controversy. It appeared the counter-proposal of this appellant reduced his individual (88) dividend for each year to exclude therefrom the proportion of the annual depletion deduction of the Bankers Company therein included as found to be fact by the Board when entire distribution of the contract money payments was made each year. After hearing the parties, the Board, of its own motion ordered deletion of its finding as to this appellant as above quoted, and substitution therefor of the following:

"In the several years involved herein the petitioner, Strother, as one of the corporation's stockholders, received payments from the Bankers Pocahontas Coal Co. and reported same in his returns but did not return them

as taxable income. The corporation received the royalties of the contracts, used such portion as was necessary for payment of the ordinary and necessary expenses of administering business, set aside a certain reserve to meet pending Federal taxes and distributed the rest to the stockholders. No allowance was made by the Commissioner to the petitioner, Strother, for any depletion reserve received by him and the Commissionr added the entire receipts to his net income and has determined deficiencies accordingly."

Thereupon, on September 29, 1930, the Board approved and ordered the determination of deficiencies proposed by appellee Commissioner to be entered in the following (89) amounts:

1919	$ 404.83
1920	145.87
1921	536.04
1922	2,188.61
1923	1,670.74
1925	860.02

9. Being advised its petition for review is being presented to this Court by the Bankers Company, alleging errors of said Board in its determination of deficiencies, and because said errors, if any, affect the determination of deficiencies against this appellant, appellant respectfully states it is proper said petitions should be consolidated, and this Court should hear and decide the petition for review of the Bankers Company and thereafter here decide the petition for review of this appellant, who hereby consents the decision of said Bankers petition shall control and be decisive as to his alleged rights, excepting the individual issue of determination of his deficiencies, if any.

10. Appellant believes and avers that errors of law and fact were committed by the Board in its aforesaid findings of fact, decision and determinations to the damage and prejudice of appellant as shown by the follow- (90) ing:

ASSIGNMENT OF ERRORS

1-8. Each of the errors, 1-8 inclusive, assigned in its petition for review by the Bankers Company.

9. In not ruling that the amounts set aside to meet any liability for tax deficiencies herein and to be distributed if such liability does not exist were distributed for purposes of determining the amount of depletion reserves received by this appellant as tax exempt income.

10. In approving and entering the tax determination proposed by appellee Commissioner, and failing to approve and enter the amended tax determination proposed by this appellant.

11. In other respects apparent of record.

WHEREFORE, your petitioner appellant prays that the aforesaid decision and determination of said Board entered as aforesaid be reviewed and reversed by this Honorable Court, and for all other and further relief as the Court shall deem meet and proper in the premises.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Appellant.

District of Columbia:

CAMDEN R. McATEE, being duly sworn, deposes (91) and says that he is one of the attorneys for the petitioner appellant; that he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken, and intended to be argued.

CAMDEN R. McATEE,

Subscribed and sworn to before me this 6th day of January, 1931.

ETHEL R. GUISE,
(SEAL) Notary Public.

NOTICE AND SERVICE OF PETITION FOR REVIEW

The General Counsel (Hon. C. M. Charest), Bureau of Internal Revenue, Washington, D. C., will please hereby take notice—

That on January 6th, 1931, a petition for review by the Circuit Court of Appeals of the United States for the Fourth Circuit of the Board decision and determination in the above entitled appeals was filed with the Clerk of said United States Board of Tax Appeals, and a true copy of said petition is herewith served upon you.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Petitioner.

Service of above notice and receipt of copy of petition for review is hereby acknowledged this 6th day of January, 1931.

C. M. CHAREST,
Attorney for Appellee.

STATEMENT OF EVIDENCE

(92) Filed July 14, 1931.

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

vs.

Docket Nos. 10472, 25275, 32170

Commissioner of Internal Revenue, Respondent.

At hearings of the above entitled appeals (consolidated for hearing) on May 3, 1929, and at subsequent adjournments thereof, before Hon. C. P. Smith, Board Member, the following proceedings were had and evi-

dence offered material to the issues presented by petitioner as appellant in his petition for review of said appeals by the United States Circuit Court of Appeals for the Fourth Circuit.

To maintain the issues joined between the parties:

It was stipulated the decision of these appeals should abide and follow decision of Bankers Pocahontas Coal Company vs. Commissioner of Internal Revenue, Docket Nos. 42664, 14516-17, (consolidated for hearing with these (93) appeals), as to the issues of sale of coal in place and amount of depletion unit allowable, this petitioner being a stockholder of said corporation.

To maintain the issues on his part joined, petitioner testified in his own behalf and made offer of various written exhibits and respondent offered no testimony:

The substance of the testimony given, of the exhibits offered and of the proceedings herein, was and is as follows:

D. J. F. Strother, called for petitioner, testified as follows:

I am the individual petitioner of the several appeals filed in my own name. I am also the president and stockholder of the Bankers Pocahontas Coal Company to the extent of about 30%, and was such stockholder during the years 1920 to 1926. During those years I received payments from the Bankers Company as a stockholder in the amounts shown in the several petitions, and made disclosure of same in my several returns. I did not return these amounts as taxable income, and claimed that they were not taxable. The respondent has assumed to declare the entire amount tax-(94) able income, and to assert a deficiency for the several years based upon the entire amount received. No allowance was made against any receipts to correspond with the depletion allowance to the company. The Bankers Company received its income from its several operating contracts. The respondent has held such re-

ceipts as royalties included a depletion reserve. The Bankers Company distributed all of the receipts except we kept a reserve to meet this question of taxation. If no taxes are due and payable to the Government on that question, that reserve will be distributed. The distribution to the several stockholders included the amount allowable to the Bankers Company as a depletion adjustment. The deficiency calculation by the respondent did not make any allowance of the depletion reserve as non-taxable income. The amount of such depletion is in controversy between the Department and the Bankers Company in these proceedings. My claim herein is that I am entitled to have the depletion allowable to the company and received by me eliminated from my income. I do not think the amounts received by me are taxable under the Sixteenth Amendment, but if they are taxable, I am entitled to a depletion rate for what I receive. My believe that they are not taxable is based upon the proposition that contracts make for a sale of coal in place, and that any gains or profits made were made before March 1, 1913.

At a hearing of the above entitled appeals, before (95) Hon. C. P. Smith, Member, on September 3, 1930, the following proceedings were had.

Respondent's attorney:

These Strother appeals are allied cases with those of the Bankers Pocahontas Coal Company, and all were determined in the same opinion by the Board. A final order of determination has been entered in the Bankers case, and the Strother appeals were postponed until this was done. Respondent filed its proposed recomputation in the Strother cases, and for the petitioner Strother an alternative computation has been offered, and I suggest for petitioner the objections to the proposed computation of respondent should be stated, and that I be permitted to defend the respondent's proposed computation.

Petitioner's attorney:

These cases of the corporation and of its president and stockholder were heard together. The material problem (96) in the Bankers case being its relation to the

operating companies under certain contracts existing before March 1, 1913. The Board ruled the relation was that of lessor and lessee, and the Bankers Company was entitled to depletion allowances as a lessor of 3.6¢ per ton of coal mined in the several taxable years. The Rule 50 settlement of the Bankers case involved the question whether such decision was proper in fixing coal mined as the basis of depletion, but the determination proposed by respondent was sustained and the deficiencies were entered according to the original opinion. The findings of fact of the Board in these consolidated cases state that petitioner Strother as a stockholder received payments from the Bankers Company which he reported in his return, but did not return them as taxable income. Such amounts were received by the corporation from its operating contracts, and entirely distributed including any depletion reserve. The Commis-
(97) sioner made no allowance to Strother for any depletion reserve so received by him, and added the entire receipts to his net income and determined the deficiency accordingly. The Board opinion says Strother is not taxable upon distributions from the Bankers Company to the extent that same is a distribution of its depletion reserve. The point this morning is that the findings of fact recite all moneys received by the Bankers Company, including depletion reserve, were distributed to its stockholders including Strother, and that the opinion says to the extent of such distribution the depletion received by Strother should be eliminated as non-taxable income the amended computation filed for petitioner Strother applies these findings of fact, assuming that the ratio of depletion reserve received to the entire Bankers income for the taxable period will likewise apply to the amount of the dividend received by the stockholder.

Objection to respondent's proposed determination
(98) was made in the original Strother counter-proposal, and appears deficient because it does not disclose the several steps taken to reach the amount of the proposed deficiency. It has been explained in conference the Department has ascertained the Bankers net income exclusive of depletion and the aliquot amount of same, assuming to represent the tentative daily earnings. Such earnings are computed over the days elapsed with-

in the taxable period until the date of a dividend payment, and to the extent of such earnings the payment is considered as paid from earnings. If the dividend payment exceeds the earnings, the excess is assumed to be a distribution of capital, and if the earnings exceed the dividend, such excess is carried forward to the next dividend date, and the same procedure is had again. When the payments from earnings and from capital are thus determined for an entire year, the proportionate stockholder's interest of Strother in such assumed (99) distribution of capital is ascertained, and is set out in the computation as the amount of his dividend which is taxable. If the determination is to follow the language of the decision and its findings of fact, the determination by respondent introduced other questions which render the findings of fact useless, while the Strother counter-proposal only applies the findings of fact and the decision. In the original counter-proposal an error was made in that the depletion reserve is taken from the adjusted income proposed by the respondent. As such deduction was previously made by respondent, the result is a double deduction for depletion. In the amended counter-proposal, the Bankers net income is compared with the total depletion allowed for the taxable year, and the prorata part which depletion is of net income, is then eliminated from the Bankers dividends and the Strother net income. Adjustment is then made as to the dividend. It is submitted these conclusions (100) follow the findings of fact, and the interpretation of the Board. In conference about the matter, the attorneys have ascertained that depletion allowable under the Board decision to the Bankers Company approximates $125,000 for the years 1920 to 1926 inclusive. At the same time, the distribution of capital under the computation of respondent is about $90,000 and there is accordingly a difference of $35,000 of depletion considered as not distributed. However, the findings of fact say that everything received of the Bankers Company including depletion was distributed. If we follow respondent's method more than 25% of the depletion to which Strother is entitled, is not given to him. For petitioner, a complete counter-computation will be supplied for the year 1919, using the depletion for 1919 determined in the West Virginia litigation, and which

figures were not available when the amended counter-computation was prepared and filed.

Respondent's attorney:

Under the law and rules of practice of this Board, the (101) petitioner who questions a proposed determination of the respondent has the burden to show the correct tax, the correct gross income, the allowable deductions and assumptions, but all this is not done in the greater number of cases. The pleadings pull out of the computation certain elements and an examination is made as to such particular adjustments. In these cases for Strother it was only shown that a certain depletion should be allowed the Bankers Company, out of which a depletion reserve should be established. It is obvious that anything distributed from the depletion reserve to Strother is non-taxable, as a return to him of the capital investment. This record does not show the gross income of Strother for the years in question, nor the facts from which his assumption can be determined. It does not show the natural or taxable character (102) of dividends, or the dividends from other corporations.

There are a number of adjustments in determining the Strother tax in these particular years that no where appear in the record. To make a proper Rule 50 computation, either party must start where the sixty day letter left off as to points not in issue on the appeal. If proof is not made on those points the party must go back and find a basis outside of the Board record as a starting point. Under the laws and regulations it makes a difference in this particular case how a corporation distributes dividends because under the law, it is assumed the corporation first distributes earnings, and until all available earnings for payment of the dividend are distributed, they are taxable at sur-tax rates, and until the earnings are exhausted, there is no distribution of a depletion reserve of other capital. In this case, the dates of payment of the Bankers dividends to Strother and others, were taken into considera-(103) tion by respondent against the earnings of the company as near as they could be found at that time. A sixty day letter was based on such an allocation of

dividends and respondent's present computation assumed that was to be followed. The pleadings raised no question, and no proof was offered in the record of the dates and amounts of dividends and of the earnings of the company, so that the Board itself could prorate them. If the distribution of dividends exceeded the available earnings, there is a necessary automatic capital adjustment to be made without regard to the question of depletion. Respondent believes such adjustment is proper here, and has been used since the first agent's report, and this record supplies no basis for the adjustment. If it is necessary for this record to supply the complete basis for re-computing the Strother tax, the petitioner has failed to maintain the complete burden of proof, but this is not reasonably expected. On the other hand, petitioner cannot now question the necessary (104) and continuous computations which have been in the case from the beginning, and do not drop out of the case where no specific Board finding is made or the record shows no specific evidence on the point. Petitioner's argument is that the depletion determined by the Board for the Bankers Company, instantly became a reserve or capital set aside in place of an exhausted asset, and that as the Board says the corporation entirely distributed its receipts including depletion reserve, it follows Strother is entitled to his entire share of such reserve. This literally follows the word for word decision of the Board. Respondent, however, does not know the Board had anything more in mind than a complete annual distribution of the net of the company. The record shows administration expenses were paid in connection with the collection of these royalties, and that it took and was allowed certain deductions of a business nature, which came out of the income from these operating contracts. Therefore, we know the royalties (105) were not literally and completely distributed, but were used at least in the small administration expenses of the company. In the testimony for petitioner it appears all the royalties were distributed in each year excepting a reserve kept to meet the present question of taxation, and that such reserve will be distributed if no taxes are found due or payable in this litigation. This testimony would justify the Board finding the fact that upon receipt of the royalties the Bankers Company used

what was necessary for ordinary administration expenses, and after setting aside a reserve to meet Federal taxes, distributed the balance to its stockholders. To such state of fact the Board's opinion is applicable in saying that the distribution of the corporation to Strother is non-taxable to the extent same constitutes a distribution of its depletion reserve.

The record does not show the amount of reserve for (106) taxes, but respondent's computation shows a distribution of $20,000 less than the actual distribution, and the total of the proposed deficiencies approximates this amount. In the face of the facts, it is necessary for the Board to revise the findings of fact, and petitioner cannot rely upon the finding of the Board that the Bankers Company distributed all of its depletion, and thereby the stockholders get all of it as non-taxable income.

Petitioner's attorney:

Objection is made to this determination as being one to be decided upon facts other than those established by the findings of fact and opinion of the Board. The opinion discusses entry of judgment under Rule 50. Although the record shows money was being withheld to meet the contingencies of this litigation, it further shows the company is upon a cash basis, and technically has no right to raise a reserve for taxes. That money has (107) been ear-marked for the contingent liability of these taxes, and put in bank, and for practical purposes has been spent toward this litigation, and everything else has been distributed to the stockholders. In such case, the findings of the Board are entirely proper and not open to dispute. They cannot be disputed under this Rule 50 situation, so that means trying the case upon a new cause and new issues, and not upon the decision and finding of fact.

Respondent's attorney:

Subject to verification by the record, the Bankers returns have been introduced in evidence here, and will show a sizable cash balance in bank. This emphasizes that a reserve was set aside, and you cannot have the money in a dividend to Strother, and also in bank in West Virginia as a reserve.

The Member:

The Board in the light of the error pointed out by respondent in its findings of fact, will, of its own motion, (108) amend the last paragraph of the findings promulgated January 22, 1930.

The within Statement of Evidence is hereby approved for certificate and signature by the Board.

CAMDEN R. McATEE
Atty. for Petitioner.

C. M. CHAREST
Atty. for Respondent.

Approved and Ordered filed this 14 day of July, 1931.

CHARLES P. SMITH
Member.

(109) **AGREED PRAECIPE**

Filed July 14, 1931.

UNITED STATES BOARD OF TAX APPEALS

D. J. F. Strother, Petitioner,

vs. Docket Nos. 10472, 25275, 32170

Commissioner of Internal Revenue, Respondent.

The Clerk will please include the following in the record upon the petition of appellant for review of the proceedings of the Board in the above entitled appeals (consolidated) before the United States Circuit Court of Appeals for the Fourth Circuit.

1. Docket entries:

(a) Docket 10472—Complete entries (insert)

(b) Docket 25275—Complete entries through January 22, 1930 followed by statement: "Subsequent docket entries are identical with those in Docket 10472 as appearing herein, and are here omitted."

(c) Docket 32170—Complete entries through January 22, 1930, followed by same statement (as above).

2. Petitions, answers and deficiency letters, as follows:

Docket 10472—Petition
Deficiency letter
Answer

Docket 25275—Caption, followed by statement:

"The petition, and answer are in substance the same (110) as in Docket 10472 and addressed to the same issues herein against adjustments and deficiencies for the calendar years 1922 and 1923, and same are here omitted excepting Paragraphs (b) and (c) of said petition, and the deficiency letter which are as follows:"

Paragraph (b) of petition (insert)

Paragraph (c) of petition (insert)

Deficiency letter (insert)

Docket 32170—Caption, followed by statement:

"The petition and answer are in substance the same as in Docket 25275 and addressed to the same issues herein against the adjustments and deficiencies for the calendar years 1924 and 1925, and same are here omitted excepting the deficiency letter which is as follows:

Deficiency letter (Insert)

3. Board findings and opinion—(January 22, 1930).

4. Petitioner's motion for rehearing and modification (February 27, 1930).

5. Board order denying same (March 6, 1930).

6. Respondent's Rule 50 settlement proposal (March 31, 1930).

7. Board order withholding settlement pending Rule (111) 50 determination in Appeal 14516 (July 15, 1930).

8 (a). Petitioner's objections and Rule 50 counter-proposal (August 12, 1930).

(b) Petitioner's amended Rule 50 counter-proposal (September 2, 1930).

(c) Petitioner's supplemental Rule 50 counter-proposal (September 10, 1930).

9. Board order amending findings (September 26, 1930).

10. Board determination on Rule 50 computation (September 29, 1930).

11. Petition for review.

12. Statement of evidence.

13. Order extending time; orders concerning record contents, not included in record.

14. This praecipe.

(Signed) CAMDEN R. McATEE,
Attorney for Petitioner.

Copy hereof acknowledged; all objections waived and consent record be accordingly prepared.

(Signed) C. M. CHAREST,
Attorney for Respondent.

(112) **AGREED ORDER**

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

D. J. F. Strother, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

(B. T. A. Docket Nos. 10472 25275 32170 Consolidated)

The parties herein by their attorneys having moved the Court for leave by agreed praecipe to establish the record herein before the United States Board of Tax Appeals to be certified for use in this Court as required by its rule, as containing the complete record as to docket entries, pleadings and other proceedings of record in one of the above entitled appeals before said Board, and to establish said record in each of the other appeals as part thereof for use in this Court, complete as to matters pertaining entirely to either of said appeals and by reference as to matters therein which are the same in substance or in identity as in said complete record, and to consider said three appeals consolidated for hearing herein, for cause, that said three appeals before said Board involved substantially the same subject matter, pleadings, proceedings and issues, and (113) were therein heard and decided as a consolidated case and from said decision a single petition for review of said decision has been taken to this Court, and for cause that said records, if established pursuant to the rule of this Court by preparation of a single record in each Board appeal, will be repetitions, confusing and unwieldy, which the parties seek to avoid; and said parties having further moved the Court that, upon filing of the petition for review and record herein and in a related petition for review of Bankers Pocahontas Coal Company in this Court, same shall proceed together as a consolidated case under the separate captions of said proceedings for purposes of briefs, hearing and decision.

And the Court being advised in the premises, it is thereupon considered and ordered:

That *sur* single petition for review filed by petitioner herein before said Board and statement of evidence thereon, the parties shall file with the Clerk of said Board their agreed praecipe to establish the record herein as including the complete record in one of said appeals, as required by rule of this Court, and as including matters from the other appeals pertinent thereto, without repetition of matters appearing in said complete record but with explanatory statements of the substance and reasons for said omissions, and that said three appeals be and the same are considered consolidated and subject to one petition for review and state-
(114) ment of evidence for purposes of said record and hearing in this Court, and that said Clerk of the Board be and he is authorized to certify said record made as herein provided, and that any rule of this Court to the contrary is expressly waived,

And it is further ordered that upon filing in this Court of the petition for review and record herein and in a related petition for review of Bankers Pocahontas Coal Company, that both proceedings shall proceed together herein, but under their separate captions, for purposes of briefs, hearing and decision.

July 8th 1931.

JOHN J. PARKER,
United States Circuit Judge.

Agreed:

(Signed) CAMDEN R. McATEE
Attorney for Petitioner.

(Signed) C. M. CHAREST
Attorney for Respondent.

A true copy.

Teste:

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

D. J. F. Strother, Petitioner,

vs.

Docket Nos. 10472, 25275 and 32170

Respondent.

(115) **CERTIFICATE**

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 114, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of July A. D. 1931.

B. D. GAMBLE Clerk.

(SEAL)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3214.

D. J. F. Strother, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

July 29, 1931, the transcript of record is filed and the cause docketed.

Same day, three (3) joint motions to extend the time for the settlement of evidence, and the transmission of the record to this Court are filed.

Same day, order dated February 26, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a period of sixty (60) days from and after March 3, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, order dated April 22, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a further period of sixty (60) days in addition to sixty days from and after March 3, 1931, granted by order of February 26, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, order dated June 25, 1931, and signed by John J. Parker, U. S. Circuit Judge, extending the time for a further period of thirty (30) days in addition to the time granted by orders of February 26, 1931, and April 22, 1931, within which to settle statement of evidence, prepare the record and transmit same to this Court, is filed.

Same day, agreed motion as to the record is filed.

Same day, agreed order as to the record is filed.

Memo. of Clerk: This order is printed at page 90 of the transcript of record.

Same day, the appearance of Camden R. McAtee and Wells Goodykoontz is entered for the petitioner.

August 8, 1931, the appearance of G. A. Youngquist, Assistant Attorney-General, Sewall Key, Special Assistant to the Attorney-General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and D. M. Evans, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

September 8, 1931, twenty-five copies of the printed record are filed.

October 12, 1931, the originals of petitioner's exhibits numbers 1 and 2 are certified up to this Court.

October 17, 1931, the appearance of Andrew D. Sharpe, Special Assistant to the Attorney-General, is entered for the respondent.

ARGUMENT OF CAUSE.

October 20, 1931 (October term, 1931), cause came on to be heard, together with No. 3215, before Parker and Soper, Circuit Judges, and Baker, District Judge, and is argued by counsel and submitted.

OPINION.

Filed January 25, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 3214.

D. J. F. Strother, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

No. 3215.

Bankers Pocahontas Coal Company, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petitions to Review the Decisions of the United States Board of Tax Appeals.

(Argued October 20, 1931. Decided January 25, 1932.)

Before PARKER and SOPER, Circuit Judges, and BAKER, District Judge.

CAMDEN R. MCATEE and WELLS GOODYKOONTZ (MASON, SPALDING & MCATEE and GOODYKOONTZ & SLAVEN on brief) for Petitioners, and ANDREW D. SHARPE, Special Assistant to the Attorney General (G. A. YOUNGQUIST, Assistant Attorney General, SEWALL KEY, Special Assistant to the Attorney General, C. M. CHAREST, General Counsel, Bureau of Internal Revenue, and DEWITT M. EVANS, Special Attorney, Bureau of Internal Revenue, on brief) for Respondent.

SOPER, Circuit Judge:

Bankers Pocahontas Coal Company vs. *Commissioner*, No. 3215:

The subject matter of this suit involves income and profit taxes of the Bankers Pocahontas Coal Company for the calendar years 1920-1926, as determined by the Board of Tax Appeals. Deficiencies in substantial amounts were charged against the taxpayer in each of these years; and a petition to review was filed. The Board made the following findings of fact with reference to the property concerned:

"In July, 1912, the Bankers Pocahontas Coal Company, a West Virginia corporation, acquired the fee simple title to approximately 6,200 acres of coal lands, including both the surface and the mineral rights in the State of West Virginia. The land had no appreciable value except for the coal content.

Upon incorporation in 1912, the corporation acquired by formal assignment and has continued to retain the beneficial interest of the original owners in certain contracts affecting the coal content which were executed in 1901 and 1902 with various operating companies and to which contracts the 6,200 acres and coal content were subject.

These contracts were originally prepared by D. J. F. Strother, who at that time was attorney, director and stockholder in the predecessor corporations. The form

of the contracts is that prevailing in the West Virginia coal fields, which followed the Pennsylvania form of contract as introduced by Pennsylvanians who were largely instrumental in the early coal development in the West Virginia field."

Each of these contracts purported to be a contract of lease between the prior owner of the land, as lessor, and a coal mining company, as lessee, covering a tract of land in McDowell County, West Virginia, for a period of thirty years from January 1, 1901. It was provided that the lessee should have the sole and exclusive privilege of mining and coking coal on the premises, and of conducting a general mercantile business thereon. In consideration thereof, the lessee agreed to pay to the lessor, as rental for the premises, a royalty (ranging from 1c to 10c) for each ton of coal mined and sold or used for any other purpose than the manufacture of coke, and a larger amount for each ton of coke manufactured and sold upon the premises. In some cases, a minimum annual rental or royalty (ranging from $4,000 to $10,000) was agreed upon. In addition, the lessee agreed to pay all taxes assessed against the property, or the coal mined, coked or manufactured. The lessee was given the option to renew the lease at its expiration; and provision was made for the final valuation and disposition of the improvements placed upon the land by the lessee.

The contention of the taxpayer is that these contracts, executed in the years 1901 and 1902, and acquired by it in the year 1912, were sales of coal in place that were fully complete before the Sixteenth Amendment went into effect; and that the royalties received during the period 1920 to 1926 were merely payments of obligations that existed unconditionally on March 1, 1913, and were not income taxable under the federal revenue acts. It is said that this construction of mining leases as sales of coal in place is the law of the State of West Virginia, laid down by its highest court, and is therefore a rule of property which the Federal courts must respect and enforce. The Board of Tax Appeals, however, overruled this contention, and directed that the royalties should be included in the gross income of the taxpayer, subject to taxation.

The application of the income tax statutes passed in conformity with the Sixteenth Amendment to the proceeds of mining was first considered by the Supreme Court in *Stanton* vs. *Baltic Mining Co.*, 240 U. S. 103. The court held that a tax on the product of a mine is not, in its essence, a direct tax on property merely because some exhaustion of the ore body must result from the working of the mine; and that even though an adequate allowance is not made for the depletion of the mineral, the tax does not become a direct tax on property because of its ownership. On the contrary, it was held in accordance with its former ruling in *Stratton's Independence* vs. *Howbert*, 231 U. S. 399, that such a tax is a true excise levied on the business of carrying on mining operations. The Supreme Court reiterated and applied this rule in *Von Baumbach* vs. *Sargent Land Co.*, 242 U. S. 503, where it was held that royalties from mining leases on lands in Minnesota constituted income subject to the Corporation Tax Law of 1909. It was pointed out that under the law of Minnesota, such leases are not merely conveyances of the ore in place, and do not constitute a sale of any part of the land, but the ore derived from the operation of the mines constitutes rents and profits from the land. Commenting on this rule, the court said:

"Ordinarily, and as between private parties, there is no question of the duty of the federal court to follow these decisions of the Minnesota Supreme Court, as a rule of real property long established by State decisions. *Kuhn* vs. *Fairmont Coal Co.*, 215 U. S. 349, 360. Whether in considering this federal statute we should be constrained to follow the established law of the State, as contended by the Government, we do not need to determine. The decisive question in this case is whether the payments made as so-called royalties amount to income so as to bring such payments within the scope of the Corporation Tax Act of 1909. The prior decisions of this court in *Stratton's Independence* vs. *Howbert*, 231 U. S. 399, and *Stanton* vs. *Baltic Mining Co.*, 240 U. S. 103, in which the Stratton case was followed and approved, are decisive of this question."

The court also held that there was no difference as

to taxability of the gains from the mining operations, whether the ore was extracted by the mine owner, as in the Stratton case, or by a lessee of the owner, as in the case of the Sargent Land Company.

All of this ground was considered by the Circuit Court of Appeals of the Third Circuit in *Rosenberger* vs. *McCaughn*, 25 F. (2d) 699, a case which related to income taxes based on royalties or rents from coal lands in Pennsylvania. In that State, the courts apply a different rule from that in vogue in Minnesota, and hold that mining leases constitute sales of the mineral in place; and it was therefore argued that the case must be distinguished from the decisions of the Supreme Court we have cited. But it was held, and we think properly, that the rules of decision laid down by the state courts with regard to property, while generally controlling upon the federal courts, do not necessarily govern those courts in the interpretation of the laws of Congress in regard to taxation and, it was pointed out that in *Von Baumbach* vs. *Sargent Land Company, supra*, the Supreme Court had reached the conclusion that royalties from mines constituted taxable income wholly aside from the construction placed by the Minnesota courts upon mining leases. The Supreme Court declined to review this interpretation of its decision when it denied *certiorari*, 278 U. S. 604. See also *Hirschi* vs. *United States*, 67 Ct. Claims 637, *certiorari* denied 280 U. S. 576; *Berg* vs. *Commissioner*, 33 F. (2d) 641, *certiorari* denied 280 U. S. 598; *Burkett* vs. *Commissioner*, 31 F. (2d) 667, *certiorari* denied 280 U. S. 565; *Alexander* vs. *King*, 46 F. (2d) 235.

We shall assume, for the purposes of this decision, that the law of West Virginia, like that of Pennsylvania, is that a mining lease constitutes a sale of the mineral in place. It was said in *Coal Company* vs. *Overholt*, 81 W. Va. 427, 434, that the English and many American decisions hold that when, in a mining lease, the parties contract with reference to a mineral known to exist, the quantity of which is unknown and incapable of exact ascertainment, and the lessee covenants to bring forth a minimum quantity annually, and to pay a minimum royalty, the contract amounts to a sale of the mineral in the land and the lessee is bound to pay the minimum price. See also *Feather* vs. *Baird*, 85 W. Va. 267; *Urp-*

man vs. *Lowther Oil Co.*, 53 W. Va. 501; *Toothman* vs. *Courtney*, 62 W. Va. 167; *Smith* vs. *Root*, 66 W. Va. 633.

Nevertheless, we think that the royalties in question, subject to the deduction allowed by the Acts of Congress, constitute taxable income. There can be no doubt that it was the intention of Congress to tax them. It is provided in Section 234a of each of the pertinent statutes, to-wit, the Revenue Act of 1918, 40 Stat. 1057, the Revenue Act of 1921, 42 Stat. 227, the Revenue Act of 1924, 43 Stat. 253, and the Revenue Act of 1926, 44 Stat. 9, that in computing the net income of a corporation subject to the income tax, in the case of mines and other natural deposits, there shall be allowed as a deduction, a reasonable allowance for depletion, according to the peculiar conditions in each case. It does not follow, as the taxpayer assumes, that the royalties cease to be income under the Acts of Congress because the leases are sales and the royalties are part payment of the purchase price under the law of West Virginia. It is obvious, as the Supreme Court has pointed out, that something more is involved under a mining lease than a sale and delivery of valuable property. Before the business is complete, there must take place the whole process of locating, extracting and preparing the ore for market. This is a manufacturing process, and in this aspect the royalties are seen to be income of the business and as such, subject to taxation. The federal courts must respect the local laws of property laid down by the courts of the state, but the power of Congress to tax must be judged by the realties of the situation and not by the logic of state rules of property, pushed inexorably to their extreme.

In *Weiss* vs. *Wiener*, 279 U. S. 333, the taxpayer, who was in the business of taking long leases on real property and subletting, claimed the right to make an annual deduction from his income for estimated depreciation of the buildings, but the Supreme Court decided that the claim was unfounded since he was not the owner of the property. The court said (p. 337):

"It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption

and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time, and we are of opinion that it should not be disturbed."

It may be noted, in passing, that the Supreme Court of Appeals of West Virginia itself did not apply the rule with regard to mining leases literally when it came to the subject of taxation; for in *Harvey Coal & Coke Co.* vs. *Dillon*, 59 W. Va. 605, it held that a mining lease, similar in all substantial respects to those involved in the pending case, constituted a chattel real, taxable to the lessee under a West Virginia statute which provided for the taxation of personal property, including, in that term, chattels real. This decision was made notwithstanding the contention that the deed created not a chattel real but a sale of the coal itself *in situ*, taxable only as realty.

The taxpayer does not seem to deny the force and effect of the decisions of the Supreme Court we have cited, but claims that the Court has since discarded the theory laid down in these cases and has returned to the well established rule that the state law of property must be accepted and applied by the federal courts. Reference is made to *Tyler, Adm.* vs. *United States*, 281 U. S. 497, *Crooks, Col.* vs. *Harrelson*, 282 U. S. 55, and *Poe, Collector* vs. *Seaborne*, 282 U. S. 101; but it is obvious that each of these decisions turned upon the fundamental question whether the property sought to be taxed came within the purview of the taxing statutes. When it was clear that such was the case, the federal statute was given effect; as in *Tyler* vs. *U. S.*, 281 U. S. 497, where the court held that the value of a tenancy by the entireties should be included in the gross estate of a decedent, for the purpose of computing the tax upon the transfer of the net estate, although, under the state law applicable to such an interest, it could not be said in a strict sense of the term that a transfer of the property had taken place. In the other cited cases, on the other hand, property was held to be excluded from the tax proposed because it did not come within the terms of the statute, and this conclusion was maintained although it was occasioned by observance of a state rule of property, and it was clear that the ruling would bring about a lack of uniformity in the incidence and operation of the tax in

different states by reason of diversity of local property rules. The Supreme Court has never abandoned the rule as to the effect of state decisions on questions of property; but it has held in some instances that state decisions do not cover the whole ground to which the federal taxing statutes relate, and in other instances, that the statutes or decisions of the state lay down rules which define and limit the property which Congress has undertaken to tax.

It is next objected that even if the royalties of the mine are taxable, an insufficient allowance for depletion has been made. The Commissioner estimated the allowance at 3.6c per ton, as the value of the coal in place on the basic date of March 1, 1913; and the deficiencies were determined on this basis. The taxpayer contends that an allowance of 5c per ton should have been made because this sum has been fixed as *res adjudicata* between the parties by reason of a judgment of the District Court of the United States for the Southern District of West Virginia rendered on January 21, 1928. The Commissioner had previously determined a deficiency against the taxpayer for the years 1914 to 1919, using the unit value of 3c per ton, and had imposed additional taxes in the sum of $6,267.08, which the corporation had paid under protest. Thereafter it brought an action against the Collector of Internal Revenue at Parkersburg, West Virginia, wherein the court determined that the rate should be 5c per ton, and rendered a judgment in favor of the taxpayer for $5,373.01, which the United States paid. Hence the taxpayer claims that the question is no longer open between it and the government, since it is a general principle that when a fact is distinctly put in issue, and directly determined by a court of competent jurisdiction between the parties in a law suit as a ground for recovery, it cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action. *Southern Pacific R. R.* vs. *U. S.*, 168 U. S. 1, 48; *New Orleans* vs. *Citizens Bank*, 167 U. S. 371.

The rule is applicable, however, only when the subsequent suit is between the same parties or their privies. The taxpayer maintains that we have that situation in the present litigation because the United States in reality is its opponent in both cases, being represented by the

Collector of Internal Revenue in the prior suit, and by the Commissioner of Internal Revenue now. But the argument is refuted by the decision in *Sage* vs. *United States*, 250 U. S. 33, where it was expressly ruled, against the protest of the government, that the court was not bound by a judgment in a former suit concerning the same subject matter between the taxpayer and a Collector of Internal Revenue, because a suit against a Collector of Internal Revenue is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. This ruling has recently been cited with approval by the Supreme Court in *Graham & Foster* vs. *Goodcell*, 282 U. S. 409, 430. The decision of the District Court for the Southern District of West Virginia was therefore not binding upon the Commissioner, and he had the authority to determine anew, as a question of fact, what allowance should be made for the depletion of the mine.

In reviewing the Commissioner's determination, the Board took into consideration not only the evidence introduced before the District Court in the prior case, but also additional evidence. The president of the corporation testified that the cost of the property, when acquired in 1912, did not exceed $507,000, a fact casting strong light on the value of the property on March 1st of the following year; in 1915, an engineer estimated that there were then twenty million tons of mineable coal, having a total value of one million dollars; on December 31, 1917, an entry was made upon the general ledger of the taxpayer that the estimated value as of March 1, 1913, on the basis of twenty million tons of coal at 5c a ton was one million dollars; and the income tax return filed for these years claimed a March 1, 1913, value of the property of one million dollars. A stipulation, filed by the parties before the findings of fact and opinion of the Board were made, to be received as a statement of fact upon any question necessary to any computation under Rule 50 of the Board, contained a schedule showing that the estimated recoverable tonnage on March 1, 1913, was 37,608,642 tons. The stipulation also included a resume of the leases, with the approximate acreage and royalties per ton in each, and also the tonnage mined and royalties received for the years 1913 to 1919 inclusive, as well as the tonnage mined, the tonnage paid for and

the royalties received for the years 1920 to 1926. From this resume of facts, it is obvious that there was substantial evidence to support the finding of the Board. As it pointed out, an allowance of 3.6c per ton would return to the taxpayer a total of $1,353,911.11 upon the tonnage estimated in the stipulation. It is true, as the taxpayer contends, that a different result might have been based upon the evidence in the record; but it is not the province of this court to find the facts anew. We merely ascertained whether there is substantial evidence to support the findings of the Board.

The taxpayer objects to the use by the Board, in determining the depletion rate, of the estimated tonnage in place on March 1, 1913, as shown by the stipulation. It is said that the stipulation was made merely to aid in the computation of the deficiency under Rule 50. The rule is applicable when the Board determines the issues in any proceeding, and withholds decisions of deficiencies for later computation. If the parties are in agreement as to the amount, copies of their computation are filed for entry of the decision; but if not in agreement, the parties may file their respective computations, and an opportunity to be heard is afforded. But any hearing is strictly confined to the consideration of the correct computation, and no argument may be made upon issues or matters disposed of by the report of the Board, or upon any new issues. The stipulation was filed in this case before the time had arrived for the filing of computations under the rule. The Board had not yet determined the principles to be applied in the computation of the deficiencies, and one of the important issues was the rate of depletion to be used in case the royalties should be held to be income. The stipulations of fact were obviously filed by the parties to enable the Board to reach correct conclusions upon the disputed points. We think the Board properly took the stipulated facts into consideration in determining the depletion allowance. They could not justly have been considered for one purpose, and not for others.

After the Board had filed its findings and opinion, the parties filed conflicting computations of deficiency, which then came on for hearing under Rule 50. The taxpayer then for the first time made the point that the schedules filed showed that under two leases, the coal

paid for in several years substantially exceeded the coal mined, and offered to introduce the leases to show that the payments were made as minimum royalties required under the contracts, with leave, to the lessees, at any subsequent time, to take out the coal paid for. The Commission objected to the offer as new matter not receivable at that stage of the proceedings, under the provisions of the rule. The Board decided that the offer constituted in effect a request for rehearing and reargument; and finally filed its order of decision without granting a rehearing or considering the evidence offered. This ruling the taxpayer assigns as error.

It is provided in Regulations 45, 62, 65 and 69, Article 216, that in case a lessee under a mining lease is required to pay annually a specified sum to be applied in payment of royalty for mineral, whenever the same shall be extracted and removed, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance, will constitute an allowable deduction from the gross income of the year in which the payment shall be made. It would have been proper to have introduced the leases in evidence at the original hearing of the case before the Board had determined the issues involved. But the taxpayer put in evidence only one of the contracts of lease as typical of all the rest. Under this form of lease, the right of the lessee to mine additional coal to offset the excess of royalty paid in any year was limited to the next succeeding year after the amount necessary to produce the minimum royalty for that year had been mined. To such a situation under the facts proved, Article 216 had no relevance. The Board was accordingly correct in its ruling that to receive in evidence the new matter offered by the taxpayer was equivalent to the granting of a rehearing of the case. It was within the sound discretion of the Board to grant or deny the taxpayer's motion; and since the evidence must have been in the possession of the taxpayer from the beginning, we cannot say that the discretion of the Board was abused. *Boggs and Buhl* vs. *Com.*, 34 F. (2d) 859, 861.

Another question for decision relates to the sum of $3,770.40 paid to the corporation in 1924 as damages for an unlawful trespass. The Board made the finding of fact that in 1920, the Flanigan Coal Company, which

owned land adjacent to that of the taxpayer, trespassed on the latter's land and removed coal to which it had no right. It then destroyed the entries and as a result the extent of its operations could not be determined. The situation was discovered in 1923, whereupon the taxpayer brought suit for damages and claimed compensation not only for the coal removed, but also for damages to the property. In 1924 the suit was compromised by the payment mentioned, but this settlement had no relation to the coal extracted as the amount of the same could not be determined. The Board quoted the testimony of the president of the corporation to the effect that the destruction of the entries had absolutely destroyed the method of going into the mine at that point; that he and his engineers had estimated that the damages to the property and to the seam of coal were at least ten thousand dollars; and that $3,770.40 was accepted because the trespasser at the time was in a precarious financial condition.

The Commissioner held that the damages received constituted gross income in the year 1924; that the trespasser had mined or damaged 15,000 tons of coal; and that the taxpayer was entitled to deduct from the amount received the sum of 3.6c per ton, or $540, for depletion. The Board sustained this action. It said that a loss caused by a tortious act, if not compensated for by insurance or otherwise, is deductible from gross income; but that the evidence did not afford facts from which the amount of the loss might be determined; and that the cost of the coal removed by the trespasser or its value on March 1, 1913, was not known. Hence it held that no deduction could be allowed for loss in 1920. As to the year 1924, it made the following statement:

"The same situation obtains with respect to the year 1924. The company received from the trespasser $3,770.40. The petitioner has found that all but $540 of this amount (which he has allowed as a deduction from gross income as depletion) constituted taxable income of the company for 1924. The company has submitted no evidence that the cost or March 1, 1913, value of the coal removed by the trespasser was in excess of $540 or that such basis plus damages to the property was in excess of $540. The determination of the Commissioner

is therefore sustained for lack of evidence showing error on the part of the respondent."

The taxpayer objects to this addition to its income for the year 1924, on the ground that the money paid by the trespasser was merely compensation for injury to the mine, and was in effect a return of capital. Any loss or gain in the transaction could be determined under the circumstances only upon a final disposition of the property. We think this position is sound. If the taxpayer were asking for a deduction from income in 1920 for the loss caused by the trespass in that year, it would be within the province of the Board to determine whether the evidence submitted by the taxpayer was sufficiently definite to justify the allowance claimed. The finding of the Board, that the amount of the coal removed could not be ascertained, showed that the amount of the loss was uncertain. But this finding likewise shows that the Commissioner's action in adding the sum of $3,770.40 to the gross income of the taxpayer in 1924, was without foundation. If there had been substantial evidence to support the finding that 15,000 tons of coal had been unlawfully extracted, and that $3,770.40 had been paid solely in settlement of that wrong, it would have been proper to have added this amount to the gross income, less the expenses for collection and an allowance for depletion. The balance remaining would have been as clearly profit in the taxpayer's hands as if it had been paid by a lessee operating on a royalty basis. But the situation is confused by the fact that the amount of coal extracted is not known. So far as can be told from the record, the amount paid by the trespasser may not have exceeded payment at the rate of 3.5c per ton. In addition, there is the uncontradicted evidence of substantial damage to the approach to the mine.

These circumstances show that the Commissioner was not warranted in adding the sum of $3,770.40, less an estimated depletion allowance of $540 to the corporation's taxable income for the year 1924. We are not dealing with a situation like that considered by the Supreme Court in *Burnet* vs. *Sanford & Brooks Co.*, 282 U. S. 389, but with a loss of capital investment. In *Doyle* vs. *Mitchell*, 2447 U. S. 179, 185, the court, speaking of such a question, said: "In order to determine whether

there has been a gain or loss, and the amount of gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." A taxpayer is not allowed to deduct a loss from gross income until the amount is definitely fixed and ascertained; and for the same reason, he should not be charged with gain on pure conjecture unsupported by any foundation of ascertainable fact. See *Burnet* vs. *Logan*, 283 U. S. 404.

It follows that as to the determination of the deficiencies of the corporation for all of the years in question except the year 1924, the action of the Board is affirmed, and as to that year, the case is remanded for further proceedings in accordance with this opinion.

Strother, Petitioner, vs. *Commissioner of Internal Revenue,* No. 3214.

This case relates to the income of a stockholder of the Bankers Pocahontas Coal Company derived from dividends by which the greater part of the royalties which the corporation received, were distributed. During the several years involved in the foregoing case, 1920 to 1926, Strother, as one of the corporation's stockholders, received dividend payments from the company and reported them in his income tax returns, but did not return them as taxable income. The Board found, in its original findings of fact, that the corporation made distribution of the entire amounts received by it as royalties, including any depletion reserve. The Commissioner determined as deficiencies against Strother the total amounts received by him from the company, and made no allowance for that part of the moneys which constituted depletion of the capital. Upon these facts, the Board held in its opinion that to the extent that the distribution made by the corporation constituted a distribution of depletion reserve, the amount received by Strother was non-taxable.

The opinion established, as we have seen, that the royalties constituted income to the corporation, and not the proceeds of sale of mineral in place, and that the proper allowance for a depletion reserve was at the rate

of 3.6c per ton. By stipulation of the parties, the decision on these matters was adopted in the Strother case. After the decision was rendered, a hearing was held upon the recomputation of the Strother deficiencies. Strother objected to the new computation proposed by the Commissioner because it did not provide for the deduction from the dividends received of a proportionate part of the entire allowance for depletion. It seems that the total depletion allowance of the corporation for the years in question was $125,000, but the computation was made as if the total allowance was only $90,000. Apparently, the Commissioner held that a sum retained by the corporation in each year to meet the tax deficiency, was in fact part of the allowance for depletion, and to that extent. the allowance for depletion had not been included in the dividends. Another question seemingly involved was whether or not in determining how much of the dividends were capital, the total net income and the total depletion for the year should be pro rated to the date of each dividend payment.

These questions appear to be those which are raised by the petitioner; but the record in the case is so vague that we cannot obtain a clear conception either of the facts to be considered or the questions of law to be decided. This situation doubtless arose because the important questions in which the parties were interested were those concerning the character of the royalty payments as return of capital or income, and if income, the proper allowance to be made on account of depletion. A decision could not be reached in the Strother case until these questions had been determined. At the hearing on the question of recomputation of the Strother deficiencies, it was pointed out by counsel for the Commissioner that the record did not supply a complete basis for recomputing the Strother tax; that, strictly speaking, the taxpayer had failed to maintain the complete burden of proof, but that this was not reasonably to be expected under the circumstances. It was conceded that the recomputation proposed by counsel for Strother was literally in compliance with the decision of the Board, but that this decision was in need of revision. Thereupon, the Board announced that it would make an amendment of its findings of fact, and this was filed after the hearing. Instead of the statement that the corporation distributed

the entire amount received from its operating contracts, the finding was substituted that the corporation used such portion of the royalties as was necessary for the payment of administration expenses, set aside a certain reserve to meet the federal taxes, and distributed the rest to the stockholders. No change was made in the opinion as to the holding that to the extent the amounts received by Strother included depletion reserve, they were not taxable; and without further recomputation, the decision complained of was promptly entered.

The government's brief in the case before us suggests that the record does not contain sufficient facts to permit a determination of the questions raised, and that therefore the Board's decision should not be disturbed. We think, however, that under the circumstances, it would be just for the Board to give further consideration to the Strother case, and to afford to the taxpayer an opportunity to introduce additional testimony to bring out the facts necessary to a decision of the issues involved. The case will therefore be remanded for further proceedings in accordance with the opinion in the case of *Bankers Pocahontas Coal Company* vs. *Commissioner*, insofar as it determines the questions involved herein, and without prejudice to the right of petitioner to rely upon the legal positions as to other matters urged upon this appeal.

Case No. 3214, *Remanded for further proceedings.*
Case No. 3215, *Modified.*

JUDGMENT.

Filed and Entered January 27, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS.
FOURTH CIRCUIT.

No. 3214.

D. J. F. Strother, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

THIS CAUSE came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that this cause be, and the same is hereby, remanded to the said United States Board of Tax Appeals for further proceedings in accordance with the opinion of this Court in case No. 3215, *Bankers Pocahontas Coal Company versus Commissioner of Internal Revenue*, in so far as it determines the questions involved herein, and without prejudice to the right of petitioner to rely upon the legal positions as to other matters urged upon this appeal, in accordance with the opinion of the Court filed herein.

MORRIS A. SOPER,
U. S. Circuit Judge.

January 27, 1932.

February 8, 1932, petition of petitioner for a stay of the mandate is filed.

Same day, order staying the mandate is filed.

PETITION OF PETITIONER FOR A REHEARING.

Presented February 26, 1932.

(Style of Court and Title omitted.)

Come the petitioners herein by their attorneys, and move the Court for a reargument of the cases presented, and a rehearing of the Court's decision of January 25, 1932, particularly for the reasons and causes herein specifically stated, as well as others apparent on the records, and to be amplified by reargument and rehearing.

The respondent taxgatherer proposes to assess and levy the taxes in controversy solely as taxes upon income authorized by the XVI Amendment, and imposed under the several Revenue Acts which give effect to said Amendment.

The petitioning taxpayers herein protest against said assessment and levy on the ground that said income taxes are neither authorized by the XVI Amendment, nor imposed by the various Revenue Acts.

A citizen may owe a tax as of right, but under the law he may not owe same. In case of doubt whether a tax is owing, the citizen may claim the benefit of the doubt.

In support of the present motion, petitioners respectfully would show the Court has erred as follows (error indicated by black face type):

(1) This Court holds:

> The certain instruments executed in 1901 by a land-owner (whose resulting interest was acquired by petitioner corporation in 1912), granting the exclusive right to mine the coal-content from said land until exhausted in consideration of payment by the grantee of a fixed amount per ton mined each year, and of a fixed minimum annual payment, effected sales of coal in place under the Laws of West Virginia where the lands are situate; **that the payments**

receivable by the grantor (or its assignee) pursuant to said instruments in the several years, are royalties, which Congress intended to subject to income tax under the several Revenue Acts enacted pursuant to the XVI Amendment after deduction therefrom of the depletion allowances provided by said Acts as available to a lessor.

The definite errors are:

(a) By said sale in place, as effected before the enactment of the XVI Amendment on March 1, 1913, was created the right to recover or collect the purchase money in the ensuing years before and after said date and said payments, whether called royalties or not, when received after said basic date are not taxable income in whole or in part.

(b) The Congress has only allowed depletion to the owner of an interest in the depletable property, including lessor and lessee, and has not allowed nor intended to allow depletion to a vendor who has parted with interest in the property.

(c) The Revenue Acts make other provisions for determination of the taxable profit of a vendor.

(d) This Court has wrongly applied the law to the facts of the case.

(2) This Court holds:

That the depletion rate of 3.6 cents per ton is applicable to coal mined, and not to coal paid for but not mined whereby the payments, as to the excess of any payment over the part thereof determined by the quantity of coal mined, is not subject to any depletion allowance.

The error is:

(a) The depletion unit, being premised upon the expectancy of entire annual minimum payments, should apply to coal paid for instead of coal mined in the several years.

(b) The Courts have reversed the position of the Board as herein substantially adopted by this Court.

ARGUMENT.

These points of decision are argued here because if the error alleged in the first be admitted, the second is immaterial. In presenting the cases, the parties were in conflict as to the construction of the instruments under the West Virginia precedents, petitioner contending they effected sales in place, and respondent contending they were only leases. The parties were not in conflict that the West Virginia rule, whatever the Court found it to be, was decisive of the liability of the payments to tax. In view of the uncertainty whether a sale in place was effected, petitioners before the Board and before this Court, were obliged to argue the sufficiency of the depletion allowance as the alternative arising for decision if there was no sale in place. When a sale in place is established the amount of depletion becomes immaterial, as that issue is removed from the case. The vendor who has parted with the depreciable property can have no depletion allowance against its sales proceeds, under the Revenue Acts.

Now, that this Court specifically holds the instruments effected sales of coal in place, the path is straightened toward final and correct determination of the rights of the parties under the XVI Amendment and several Revenue Acts. In addition to the grounds given in the opinion for holding a sale in place was effected, specific reference to the instruments strengthens said conclusion. It appears, that the vendor owner covenants the purchaser of the coal content "*shall have quiet and peaceful enjoyment of same*" (the certain tract of land), thus giving the purchaser *control* and *possession* of the whole tract; the vendor owner further gives the purchaser "*the privilege* of using so much of the surface of said land, and so much of the lumber, stone, sand, clay and water *as may be necessary*", thus evidencing the intent of making a severance of realty, and giving entire possession for

benefit of the purchaser from any dominion, control or possession by the vendor owner. The interpretation of these unique and unusual provisions is controlled by the manifest intentions of the parties, and is but little influenced by other contracts of a like general nature, but lacking such direct contractual provisions, and leads inevitably to the conclusion that a sale in place was intended and effected.

This brings us to the discussion of the specific errors above alleged:

> **1(a) By said sale in place, as effected before the enactment of the XVI Amendment on March 1, 1913, was created the right to recover or collect the purchase money in the ensuing years before and after said date and said payments whether called royalties or not, when received after said basic date were no more taxable income than were the payments of same received before said date.**

The XVI Amendment, says Mr. Chief Justice White in *Stanton v. Baltic Mining Co.*, 240 U. S. 103:

> *"conferred no new power of taxation"*—

In his earlier opinion in *Brushaber v. Union P. R. Co.*, 240 U. S. 1, Judge White pointed out that Congress was invested by the Constitution with every conceivable power of taxation, subject to provisions thereof that direct taxes should be apportioned and indirect taxes should be uniform, and that the income taxes of the Civil War were classed as indirect taxes.

The opinion explains the XVI Amendment became necessary to remove the principle enunciated in the *Pollock* case (157 U. S. 429), that a tax upon income enacted as an excise tax subject to the rule of uniformity was a charge upon invested property, and, to that extent, was a direct tax requiring apportionment, and consequently unconstitutional.

In *Evans v. Gore*, 253 U. S. 245, the genesis of the XVI Amendment is reviewed together with intervening precedents, as a basis for conclusion that same did not extend the taxing power to new or excepted subjects. Reference is made in the opinion to the message of Governor Hughes to the New York Legislature, expressing the fear that same might extend to excepted subjects, and to the assurances to the contrary thereby obtained.

As the XVI Amendment does not add to the power of Congress to tax, and merely struck down the *Pollock* principle, as said in the *Baltic Mining* case in that it

> —"simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived"—

it follows the XVI Amendment authorizes no income tax upon a claim accrued before and existing on March 1, 1913, when subsequently recovered or collected. The proposition states itself and is a mirror for our argument. Such a claim was capital, and the realization of its subsequent proceeds remains as capital. Thus in *Burnet v. Logan*, 283 U. S. 404, taxpayer after March 1, 1913, sold certain stock for a consideration payable in cash and in the receipt of certain royalties upon ore subsequently mined. It is held she received no taxable income in the payment to her of the royalties, until and after such payments had returned to her the value of her stock when same was sold, and that any attempt to state a partial capital return by depletion calculations would be and is a determination of income by mere conjecture not available to respondent, and not to be imposed on taxpayer.

In the present case for example, the receipts including the years in controversy since March 1, 1913, total $750,000 which is less than the $1,000,000 value in 1913 which the Board and Court says will be returned to the extent of $1,300,000 upon exhaustion of the mines. It follows said capital value of 1913 has not been received, and that no income is contained in the annual payments. If there be no income, the entire receipt is a return of capital.

Test it as you will, the annual receipt of payments of the purchase price for the sale of coal in place is the return merely of capital without income increment.

1(b) The Congress has only allowed depletion to the owner of an interest in the depletable property, including lessor and lessee, and has not allowed nor intended to allow depletion to a vendor who has parted with interest in the property.

If this proposition is correct, it is not necessary to argue for the weight that Congress may or may not give to state rules of property in levying the income tax. That Congress must and does recognize the state rules of property becomes self-evident.

In *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, and *Burnet, Commissioner, v. Thompson Oil and Gas Co.*, 283 U. S. 301, the rule is definitely stated that a taxpayer is not entitled as a matter of right to make any deduction from annual income for depletion, and authority therefor must be found in the Revenue Acts. The several Revenue Acts allow the prescribed deduction to an owner, and to lessor and lessee, by equitable apportionment of same between them. The deduction is not allowed otherwise, and the right to it is strictly construed. Thus the *Thompson Oil* decision denies any increase in the depletion deductions for later years to redress the apparent inadequacy of deductions previously permitted. In *Darby Lynde Co. v. Commissioner*, 51 F. (2) 32 (C. C. A. 10) (cert. denied, 52 S. C. 40), the de-

pletion on discovery value available to a partnership is denied to a successor corporation created and owned by the partners. In *Pugh v. Commissioner,* 49 F. (2) 76 (C. C. A. 5) (cert. denied, 52 S. C. 22), the taxpayer is held upon conveyance by him of his interest in a mineral lease to thereby lose the right to depletion as to said interest, the ground being he has become a lessee without investment. In *South Vernon Oil Co. v. Hopkins,* 49 F. (2) 1028 (C. C. A. 5), the conclusion is the same, notwithstanding the Revenue Act of 1926 defines allowable depletion as a fixed per cent of gross income from the property during the taxable year, on the ground the sale severed the depletable interest in the property. In *Fleming v. Commissioner,* 6 B. T. A. 900, affirmed 50 F. (2) 1075 (C. C. A. 9), the life beneficiaries under trusts are held not entitled to depletion against trust income consisting of royalties from ore properties. In *Murphy Oil Co. v. Burnet, Commissioner,* —F. (2) — (January 11, 1932) (C. C. A. 9), the Court describes the statute:

> "The Statute with reference to depletion of oil properties is a special one with reference to the particular subject of oil leases involving the production of oil and minerals from mines, and the consequent return of capital by the owners of interests therein, and controls over other general provisions of the law in regard to the return of capital investments."

In *Weiss v. Wiener,* 279 U. S. 333, as this Court says: The depreciation upon buildings contended for by taxpayer was disallowed notwithstanding his long lease savored of a fee under the laws of Ohio, because:

> "The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the leases may be called"—

which is a reiteration of the fact of the case, stated in the opinion as follows:

> —"he must show an interest in the property and a present loss to make the statute apply."

Mr. Justice Holmes correctly finds Wiener as lessor was merely renting the property and improvements, and being without interest therein, had no right to the depreciation allowance prescribed in the Revenue Act. In so doing, reference is made to *Lynch v. Allworth Stevens Co.*, 267 U. S. 364, where a lessee is declared entitled to depletion, although without title to the ore deposit, since the right to remove the ore is a property right which decreases as the mine is exhausted. There is no decision that the so-called lessor remains a lessor after parting with title to the mineral. We do not believe this Court intended to lay down that unique proposition of law in its opinion, but such is its effect.

Admitting the "Act of Congress has its own *criteria*, irrespective of local laws", it appears *interest in the depreciable or depletable property* is part thereof, and that in case of severance of the interest, or failure to acquire the interest, the taxpayer has no right to depreciation or depletion. But the Act of Congress does not prescribe the *criteria* of severance, and same must be found in the local law. If the discoverer of mineral conveys same he loses his right to depletion, and his purchaser does not acquire the right to deplete upon a discovery value. If the lessor sells his royalty interest, or the lessee sells his contract interest, each loses the right to depletion. If an owner sells coal in place, the right to depletion passes to the purchaser and cannot be forced upon the vendor by the decision of this Court when not authorized by the Revenue Acts.

That the *criteria* of severance is derived from the local law appears in *Group One Oil Corporation*, 283 U. S.

279, where the local law of sale of mineral in place was held to divest the property of its previous immunity from tax. We point out other instances hereafter.

We have said it was not necessary to argue the weight to be given to local laws of property by Congress to sustain the present proposition. We are here dealing with real property and the position of Congress and of the Courts in that such rules must be recognized and given effect.

In *McCormick v. Sullivant*, 10 Wheat. 192, we read:

> "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass from one person to another."

In *United States v. Fox*, 4 Otto 315, we read:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivant*, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

As the sale in place made the owner and corporate petitioner (its successor), a vendor, Congress, through income tax taxation or otherwise, could not treat such vendor as a lessor. The proceeds of the sale in place became purchase money not rentals under a lease, and they so remain. If A owned no property he is not taxable as an owner, vendor or lessor, or if he leased his property he is not taxable as a vendor, or if he sold it he is not taxable as a lessor. As said in *Nichols v. Coolidge*, 274 U. S. 531:

> "—under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

1(c) The Revenue Acts make other provisions for determination of the taxable profit of a vendor.

Only a few pertinent decisions are given in support of this proposition for the sake of brevity. In *Ferguson v. Commissioner*, 45 F. (2) 573, (C. C. A., 5), taxpayer in Texas negotiated oil leases as to 7/8ths of the mineral, retaining the remaining 1/8th interest, and received thereby a cash bonus and the royalties. Under the laws of Texas he made a sale in place of the 7/8ths interest, and his bonus-receipt was held subject to the Revenue Act provision imposing a special rate of tax upon the bonus as a capital gain from a sale, and his retained interest was held subject to depletion allowances as a property interest retained by him.

In *Alexander v. King*, 46 F. (2) 235, a taxpayer in Oklahoma claimed her royalty receipts described as "the equal 1/8th of all oil produced and saved" were subject to the capital gain provision. But in Oklahoma there can be no ownership of oil in place, and consequently no

sale of same, and consequently the capital gain provision was inapplicable as there was no sale.

In *Berg v. Commissioner*, 33 F. (2) 641 (C. C. A. of D. of C.) and *Burkett v. Commissioner*, 31 F. (2) 667, responding to the contention that the capital gain provision should apply, it was held the instruments did not effect a sale and the provision could not be invoked.

Herein, where this Court finds a sale in place of the entire coal content, it follows, under the *Ferguson* case, that the profit, if any, is subject to be ascertained under the capital gain provision and not under the depletion provision of the Revenue Acts. But neither applies until the receipts have returned the capital value sold, and we have shown such return is not yet accomplished.

1(d) This Court has wrongly applied the law to the facts of the case.

This Court concludes, after discussion of various judicial precedents, that the several instruments effected sales of coal in place, and, nevertheless, the payments receivable as the proceeds of said sales, subject to depletion allowances, constitute taxable income, saying:

> "The Supreme Court has never abandoned the rule as to the effect of State decisions on questions of property; but it has held in some instances that State decisions do not cover the whole ground to which the Federal taxing statutes relate; and, in other instances that the statutes or decisions of the State lay down rules which define the property which Congress has undertaken to tax."

Respectfully, this conclusion is provoking in its indefinite statement. The Federal taxing statutes, as in the *Tyler* case, deal with a succession or transfer tax or death duty laid upon the happening of an event as distinguished from its tangible fruits; or they deal with a tax upon the tangible fruits, that is the taxable income,

if any, realized from a transaction. In either case, the tax springs into existence upon the happening of an event. In case of income tax laws, as Mr. Justice Holmes says in *Weiss v. Wiener, supra*:

> "They do not charge for appreciation of property * * * unless realized in money by a sale."

Having a sale in the present case, as the only material factor, we do not believe this Court intends to say:

> "—it (the Supreme Court) has held in *cases of a sale* that state decisions do not cover the whole ground to which the *income tax* statutes relate; and in other *cases of a sale* that the statutes or decisions of the state lay down rules which define the property which Congress has undertaken to tax."

for if that is its meaning, we cannot apply the rule as any decision of the present case.

The coal-lands herein undoubtedly represented a capital asset, the sale of any part of which might be made, but the Revenue Acts nowhere define a sale. The Supreme Court has defined a sale as:

> "Ordinarily a transfer of property for a fixed price in money or its equivalent." *Five Per Cent Cases*, 110 U. S. 471.
>
> "Sale is a word of precise legal import both at law and equity. It means at all times, a contract between the parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson v. Berry*, 8 How. 495, 544.

As the word "sale" has an universal meaning, and as real property interests were sold in this case, in the absence of its definition in the Revenue Acts, resort must be had to the laws of West Virginia to determine the interest or title conveyed by the instruments, and this

Court finds a sale in place was thereby made in 1901. It follows the vendor was thereby divested of ownership and interest, and that no interest is available for depletion allowances.

This Court refers to mining as a business and to royalties as income from same, and therefore subject to taxation. This is derived from *Strattons Independence v. Howbert,* 231 U. S. 399, rejecting the contention that:

> "—a mining corporation is not engaged in business, properly speaking, but is merely occupied in converting its capital assets from one form into another"—

but in that case the distinction applicable to this case is clearly stated:

> "The sale outright of a mining property might fairly be described as a mere conversion of the capital from land into money."

Having sold the coal content for money, herein the original vendor and its successor thereafter had no mine, no interest in a mining business, nothing but a claim for the purchase price as the result of conversion of its capital from land into money.

In *Stanton v. Baltic Mining Co.,* 240 U. S. 103, it is true the *Stratton* case was followed, but that does not make either decisive herein. In both those cases, the taxpayer was "*carrying on mining operations * * * upon mining lands owned by itself*", and engaged in a manufacturing process. In the *Stanton* case, it was contended the income tax fell upon the property and was prohibited by the Pollock rule; it was decided the XVI Amendment destroyed the Pollock precedent, and that as an excise tax same was not a direct tax upon property.

In *Von Baumbach v. Sargent Land Co.,* 242 U. S. 503, quoted by the Court, the situation is summarized in the opinion as follows:

"We think that the payments made by the lessees to the corporations now before the Court were *not in substance the proceeds of an outright* sale of a mining property, but, in *view of the terms of these instruments, were in fact rents or royalties* to be paid upon entering into the premises and discovering, developing and removing the mineral resources thereof, and, as such, must be held now as then, to come fairly within the term 'income' as intended to be reached and taxed under the terms of the Corporation Tax Act." (Our italics.)

To complete our argument we cite *United States v. Biwabik M. Co.*, 247 U. S. 116, in which a lessee in Minnesota of iron ores is held, upon authority of the *Sargent* case to be *"in no legal sense a purchaser of ore in place"*, and not entitled to any depletion. By the *Sargent* case (the lessor) and the *Biwabik* case (the lessee), it appears neither lessor nor lessee was entitled to any depreciation under the Act of 1909, and, in *Lynch v. Alworth Stevens Co.*, 267 U. S. 364, this is plainly stated. The Revenue Act of 1916, however, provided a deduction for "exhaustion of property arising out of its use", and the *Lynch* case held same was not available alone to the lessor as the holder of title, but was available also to a lessee who had no title to the ore in place. This conclusion is placed on the ground that the right of the lessee to mine and remove the ore is property within the meaning of the statute.

In these authorities there is no direct definition of the depletion rights applicable to *proceeds of an outright sale*, but a distinction between such *proceeds* and mere *royalties* or rentals is evident. The Court carefully defines the receipts as not *proceeds of a sale*, or characterizes the taxpayer as *not a purchaser*, or as *with or without an interest* in the ore in place.

Hirschi v. United States, 67 Ct. Cl.; *Berg v. Commissioner*, 33 F. (2) 641, and *Burkett v. Commissioner*, 31

F. (2) 667, have some authority when the denial of certiorari is suggested. But the *Burkett* and *Berg* instruments do not appear to be more than leases and the decisions become immaterial. The *Hirschi* instrument is held not effective as a sale in place under the laws of Texas and the Court supports same by citation of *Steedman v. United States*, wherein certiorari was denied, but the *Steedman* case is expressly disapproved in *Crooks v. Harrelson*, 282 U. S. 55. The *Hirschi* case is in effect disapproved in *Group One Oil Corporation v. Bass*, 283 U. S. 279. The Court of Claims says in the Hirschi decision:

> "Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different states."

But in the later decision of *Poe, Collector, v. Seaborn*, 282 U. S. 101, the Supreme Court said:

> "These Sections (of the several Revenue Acts) lay a tax upon the net income of every individual. The Act goes no further, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase." * * *
>
> "Said differences of state law, which bring a person within or without the category designated by Congress as taxable may not be read into the Revenue Act to spell out a lack of uniformity."

If the proceeds of a sale in place are not taxable when ascertained by the law of West Virginia, but, as proceeds of a lease, are taxable in another state, the return

not subject to taxation in either case is the depletion allowance against same intended to return the capital outlay. There is no lack of uniformity for the vendee of the mineral in place taxes the entire depletion deduction, while lessor and lessee divide same between them.

If the rule be that, notwithstanding a sale in place, the vendor is entitled to depletion, same conflicts with the established rule that depletion follows the property interest. It means the sole owner of the capital interest is partially deprived of the depletion deduction. It means a denial of final decisions to the contrary, and an allowance not authorized by law. It means confusion for the annual payments by the vendee are, as to him, capital investments not deductible from his gross income, *Jefferson Gas Coal Co. v. Commissioner,* 52 F. (2) 120 (C. C. A., 3), and as to the vendor they are rentals and not purchase-money receipts.

Rosenberger v. McCaughn, 25 F. (2) 699, is not rested upon the Supreme Court decisions in prior cases, but upon the ground that the calculation of income by the Commissioner as being within the payments received as proceeds of a sale in place is nowhere questioned and upon the ground—

> "—we think each payment represented in some measure both capital and increment, capital because it stood in the place of coal, and increment because in the payments running through ninety-nine years interest on the capital must inevitably have been included." * * *

This thought of the Court contravenes the settled rule stated with copious citation in *United States v. Merriam,* 263 U. S. 179:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself

with the substance of the thing upon which the tax is imposed, rather than with legal forms and expressions. But in statutes *levying taxes the literal meaning* of the words employed is most important, for such statutes are not to be *extended by implication* beyond the clear import of the language used. If the words are *doubtful*, the *doubt* must be *resolved against* the government and *in favor of the taxpare* * * * ."

"I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes *within the letter of the law, he must be taxed*, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute*, when you can simply adhere to the words of the statute."

It contradicts *Saunders v. Commissioner*, 29 F. (2) 832 (C. C. A., 3); *Platt v. Bowers*, 13 F. (2) 951; *United States v. Guinzberg*, 278 F. 363 (C. C. A., 2); *Park v. Gilligan*, 293 F. 129, and *Schneider v. Duffy*, 43 F. (2) 642, previously discussed in the brief of petitioners. It contradicts *Logan v. Commissioner*, 42 F. (2) 193 (C. C. A., 2), as recently affirmed in *Burnet v. Logan*, 283 U. S. 404. These are decisions that subsequent payments upon rights to money established and accrued before the XVI Amendment are only the return and collection of capital without income increment.

From these several viewpoints, we submit the Court has not applied the precedents properly because same, under the different facts of this case, and under subsequent *stare decisis*, are inapplicable to the present case.

2(a) The depletion unit, being premised upon the expectancy of entire annual minimum payments, should apply to coal paid for instead of coal mined in the several years.

(b) The Courts have reversed the position of the Board as herein substantially adopted by this Court.

These points relate to the alternative position that depletion is allowable herein.

The Board ruling and the approved tax determination allow depletion only upon coal mined in any year instead of upon coal actually paid for. In presenting its tax determination so approved, respondent's counsel (R. 108) stated apologetically to the Board:

> "—in the respondent's computation allowances were computed at the rate of 3.6 cents per ton upon tonnage mined each year; that this method was in accordance with the opinion in this case, and consistent with the Board's rulings in other cases, *although the respondent in other cases was committed to the principle of allowing depletion on tonnage of coal paid for instead of upon tonnage actually mined in a taxable year.*" (Italics ours.)

The struggle of the Board against the position of respondent and taxpayers that depletion is allowable upon coal paid for and not merely upon coal mined, which would include depletion on any bonus or payment in excess of the price of coal mined, did not reach the courts for a long time, and when it did the Board was recently reversed in *Murphy Oil Co. v. Burnet*, — F. (2) — (January 11, 1932) (C. C. A. 9).

Therein, respondent, by cross-petition, carried the issue to the Court, and obtained a most thorough and convincing opinion upon the question.

In the present case, the Board set out in its findings certain schedules of production and royalty payments, which this Court has approved. Petitioner (R. 109) sub-

mitted same demonstrated the minimum payments substantially exceeded the payment for coal mined, and offered to confirm the fact by the instruments themselves. The refusal of the Board to allow depletion upon coal paid for is a specific assignment of error.

The materiality of the question arises in three ways:

First. If petitioner receives $200 as a 10-cent per ton payment on 2,000 lbs. of coal, of which only 1,000 lbs. was mined, its depletion allowed is 1,000 × .036, or $36.00, instead of 2,000 × .036, or $72. In other words, its depletion allowance being limited to coal mined, same is not allowed against the payment of $100 made for coal not mined, and same is thereby considered by the Board opinion as a bonus not subject to depletion.

Second. In computing the depletion unit of 3.6 cents, the bonus excluded from its application is given effect, but such effect is disallowed in only allocating the depletion unit against coal mined. This requires some explanation. The respondent's basis for the 3.6 cent allowance is stated in this record (R. 93) as an estimate of 14,000,000 tons of recoverable coal with average mining tonnage of 350,000 tons indicating a mine-life of 40 years with an average annual income therefrom of $34,000. After 40 years, in other words, the entire receivables of petitioner from the instruments amount to $1,360,000, the present worth of which on March 1, 1913, is $510,000. This latter amount divided by 14,000,000 tons gives the unit of 3.6 cents per ton. This method is described in Articles 206 and 211 in petitioner's brief (p. 60). This brings us back to the first proposition as applied to the second. It is that 3.6 cents is based upon the minimum royalties as a factor of computation, but if $34,000 is received annually and only $17,000 of coal is mined, the effect is to allow a depletion only on $17,000, whereby $17,000 is deemed a bonus and is denied depletion. An-

other statement of the situation is that petitioner receives in effect 1.8 cents instead of 3.6 cents per ton upon the $34,000 payment.

Third. The statute with reference to depletion, being a special provision intended to return their capital to the owners of interests in mining properties, the money received for coal paid for involves such return and should be subject to the depletion allowance.

Turning to the schedules in the Board findings we find substantial excess payments under Leases 2 and 4 as follows:

Year	*Mined*	*Paid for*	*Excess*	*Mined*	*Paid for*	*Excess*	*Mined*	*Paid for*	*Excess*
1920...	57,189	120,000	62,811	86,918	100,000	13,082	19.231	187,500	168,269
1921...	54,660	120,000	65,340	15,297	100,000	84,703	25,024	306,250	271,226
1922...	55,864	120,000	64,136	.....	.....	.....	45,483	370,433	324,950
1923...	51,422	120,000	68,578	.....	.....	.....	74,152	340,782	266,630
1924...	57,928	120,000	62,072	.....	.....	.....	103,877	343,657	239,780
1925...	68,804	120,000	51,196	91,170	100,000	8,830	117,792	325,000	207,208
1926...	90,029	120,000	29,971	.....	.....	.....	153,717	335,115	181,408
			404,104			106,615			1,659,471

In these seven years petitioner is deprived of depletion upon 2,000,000 tons—that is, petitioner pays tax upon $72,000, and further analysis serves to increase the amount, although petitioner and respondent agree the decision is wrong and the only Circuit Court of Appeals that has considered the question says the decision is wrong. As we have quoted from *Nichols v. Coolidge, supra*:

"Taxes are very real things."

When respondent and his counsel go into Court in another case to sustain his Departmental position and succeeds, it seems unusual that they should stand precisely for a contrary position herein. The foregoing schedules found relevant by this Court demonstrate the substantial difference between coal paid for and coal mined. It becomes immaterial whether the coal paid for could subsequently be mined because the receipts therefor, considered as a bonus, are subject to depletion, and the rulings of the Board to the contrary have fallen away.

This Court does not in its opinion refer to this point, although petitioners argued same in their brief (pp. 66-70). It is submitted it goes to the very heart of this case and is entitled to consideration. Evidently the *Murphy Oil* decision in the Ninth Circuit is final for respondent has therein sustained his previous position, and has thereby obtained a reduction of the tax for the taxpayer, and both parties are satisfied. It is unfortunate that petitioner and respondent herein were not standing together in this Court against the Board, as they stood at its bar and urged that depletion, if any, was allowable by the statute in this case upon coal paid for. It would be more unfortunate if either party failed to bring the situation to the attention of this Court.

(3) The Court erred in holding the West Virginia judgment is not res adjudicata as to the allowable amount of depletion.

In the Board findings it appears the West Virginia Collector was defended by the United States District Attorney and the General Counsel of respondent. It is a matter of judicial notice that the Collector and Commissioner are each officials of the Government in related capacities as the duties of both are concerned with the collection of the revenue. It is equally clear the Collector was defendant in the West Virginia action, and the Commissioner is the defendant herein, and that neither proceeding is directly against the United States.

In its original brief, petitioner did not argue the United States was the real defendant and respondent laid down the proposition that these appeals were really proceedings against the United States, citing *Sage v. United States.* The situation therefore arises that, admitting a judgment against a Collector is not *res adjudicata* against the United States, whether such judgment is or is not *res adjudicata* against the Commissioner.

This Court does not decide the Commissioner is in effect the United States, and, as apparently the Commissioner and Collector stand in the same relative positions, we do not believe it will so decide. If this is not really a proceeding against the United States, and it is no more so than the proceeding against the Collector, then this Court falls into error in holding *Sage v. United States* is authority for holding the Commissioner is not bound by the judgment against the Collector.

Even though petitioners had maintained that the United States was really the opponent herein and in the West Virginia action, it follows that the *Sage* decision would deny the contention. Thereby the United States was not bound in the West Virginia judgment and was not the real party in interest. Whether the United

States is the real party here remains an undecided question not reached by the *Sage* decision.

This Court, before falling into said error, said:

> "The rule (*res adjudicata*) is applicable, however, only when the subsequent suit is between the same parties or their privies."

and we proceed from this point.

That the Collector and Commissioner were privy in the West Virginia case is found by the Board. The record (p. 89) further recites a consent order signed by the District Attorney and Special Attorney for the Bureau of Internal Revenue as well as the attorneys for plaintiff, and a stipulation of facts and agreement that all papers should be received with the probative weight of testimony from witnesses. Thus the privity in fact is evident if sustained in law.

Here is the case of the respondent Commissioner cooperating with the defendant Collector in defense of the West Virginia action, although not a party of record in same.

In *Beyer Co. v. Fleischmann Co.*, 15 F. (2) 465, (C. C. A., 6), where a similar situation prevailed, we read:

> "The general rule is that one who prosecutes or defends a suit in the name of another, to establish or protect some interest of his own, or who openly assists in an action in aid of some such interest, to the knowledge of the opposing party, is as much bound by the judgment as he would be if he had been a party of record. Penfield *v.* Potts & Co. (6 C. C. A.), 126 F. 475, 61 C. C. A. 351; Greenwich Ins. Co. *v.* Friedman Co. (6 C. C. A.), 142 F. 944, 74 C. C. A. 114; Foote *v.* Parson, etc. (6 C. C. A.), 196 F. 951, 118 C. C. A. 105; Southern Pacific R. Co. *v.* United States, 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed. 355; Souffront *v.* La Compagnie Des Suereries, 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846."

In *White v. Croker*, 13 F. (2) 321 (C. C. A., 5), the rule is again stated:

> "The rule under which one not named in a judgment may be bound thereby in consequence of participation in the suit in which the judgment is rendered is that one who prosecutes or defends a suit in the name of another to protect or establish his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. Souffront *v.* Campagnie, etc., 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846."

In *Souffront v. Campagnie*, 217 U. S. 475, states the same rule:

> "The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. Lovejoy *v.* Murray, 3 Wall. 1, 18 L. Ed. 129."

Further citation seems needless, as it is clear the Commissioner and Collector acted in concert in West Virginia and are equally bound by the result. Privity being admitted, it would reasonably follow the *res adjudicata* of the judgment as to the amount of depletion should be declared by the Court.

(4) The remanding of the Strother appeal is ineffective so far as compliance with the ruling in the Bankers appeal is required, unless said rulings be finally correct.

As the rights of Strother and other stockholders are dependent upon the decision in the case of their corporation, it follows such decision unless complete and correct in all material respects will only increase the error as affecting the stockholders.

If the corporation receipts as proceeds of sales in place effected before the XVI Amendment are not subject to tax, their distribution to stockholders is affected.

If, in the alternative, such receipts are subject to depletion allowances, such allowances must be correct to be properly effective.

If receipts measured by coal paid for but not mined are a bonus, whether same is or is not subject to depletion is material.

These relations between the case of the corporation and the stockholder emphasize the importance of finding the correct answer to the questions raised in these cases.

They demonstrate the propriety of the stockholder joining in this application for rehearing.

In Conclusion.

We respectfully submit as material error the failure of the Court to find:

1. That, as a sale in place is admitted to have taken place before passage of the XVI Amendment, the receipt of proceeds of the certain accrued claim, as paid thereafter, is a return of capital without income capital is to be fully returned before income subject to tax can be ascertained.

2 (*a*) Alternatively, depletion is a special statutory allowance awarded to the owner of an interest in property. Where the interest is terminated by a sale in place,

there can be no remaining interest sufficient to measure a depletion allowance in the proceeds of the sale.

2 (*b*) Alternatively, depletion allowances, if any, exist against all receipts from the depletable interest, including any bonus payment, and in these cases will apply to coal paid for and not merely to coal mined in the several years.

3. Alternatively, depletion allowances, if any, herein as *res adjudicata* through the privity of the Collector and Commissioner in defending the West Virginia action.

We submit the Strother appeal must abide the reconsideration of the opinion in the Bankers case.

We submit any other error, of incidental nature, will disclose itself upon further consideration of the foregoing matters by the Court.

Respectfully submitted,
WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.,
D. J. F. Strother.

Certificate of Counsel.

We, Camden R. McAtee and Wells Goodykoontz, attorneys of record for the petitioners in the above styled cases for review, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

(S.) CAMDEN R. McATEE,
(S.) WELLS GOODYKOONTZ,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.,
D. J. F. Strother.

PETITION OF RESPONDENT FOR A REHEARING.

Presented February 26, 1932.

(Style of Court and Title Omitted.)

We respectfully request that this Court withdraw the portion of its opinion requiring a rehearing in the Board of Tax Appeals on the grounds:

That this Court is without power to modify or to reverse a decision of the Board of Tax Appeals which is in accordance with law.

The issue in this case was what part of dividends received by petitioner, from the Bankers Pocahontas Coal Company, came out of earnings and what part was a distribution of capital. The income of the Coal Company was composed entirely of royalties received under coal mining leases. The Board found the Company used such part of the royalties as was necessary for administration expenses and to set up a reserve to meet pending Federal taxes, and distributed the balance to the stockholders. (R. 71.) The Company in its appeal (No. 3214) before this Court from the decision of the Board of Tax Appeals in its case, contended first, that the royalties received in the years here in question were part of the sale price of coal in place and constituted a return of capital and not income; or, in the alternative, in case the court should decide against that contention, that it was entitled in computing net income to a deduction for depletion at the rate of 5 cents a ton instead of 3.6 cents as allowed by the Commissioner of Internal Revenue. This Court ruled against the Company in each of those contentions.

It was stipulated by counsel in the present case, that the decision in this case should abide by and follow the decision in the case of the Company upon these two points. The Board of Tax Appeals in its opinion said (R. 45):

To the extent that the distribution made by the corporation constitutes a distribution of its depletion reserve the amount received by Strother is non-taxable. Parties are in full accord as to the treatment to be given the individual appeals.

After the Board's decision herein, each party submitted to the Board proposed recomputations of petitioner's tax liability for the several years in question. After a hearing thereon and after considering the argument of counsel, the Board decided that the proposed redeterminations submitted by respondent were in accordance with its findings of fact and opinion and entered an order in accordance therewith.

On appeal to this Court, petitioner contended that the Board's decision with respect to the part of the distributions in each year that came from depletion, was erroneous. The only basis for this contention is that the proportion of each distribution that should be regarded as depletion, should be the same as the proportion of the Company's receipts that represented depletion. This does not necessarily follow, and the difference may well be accounted for as a result of the application of the method prescribed by Article 1542 of Regulations 45.

However, no facts were shown to prove either that the Commissioner's computations were incorrect under Article 1542, or if incorrect that the figures presented by petitioner are right. The burden was upon petitioner to show what the correct tax should be. See *Reinecke* v. *Spalding*, 280 U. S. 227.

This Court held that the Board should give further consideration to the case and afford the taxpayer an opportunity to introduce additional testimony to bring out facts necessary to a decision of the issues involved, and it remanded the case for further proceedings.

It is believed that no question of law was presented to this Court, and that the issues raised by petitioner could not have been passed upon by this Court because of an absence of facts to raise those issues. In these circumstances, it does not appear that there was any error of law in the Board's decision and this Court is therefore without power to remand the case for further hearing.

A petition for rehearing upon this ground in a similar situation was recently presented and is now pending in this Court in the case of *H. A. Underwood v. Commissioner*, No. 3208, decided January 12, 1932. The argument there presented in favor of the relief asked for by respondent is applicable with equal force to the present case. To avoid repetition, reference is made to that petition and that argument is incorporated herein by reference.

Conclusion.

We respectfully submit that the portion of the opinion requiring a rehearing in this case by the Board of Tax Appeals should be withdrawn. If the Court is not convinced that this should be done, we respectfully request that the case should be set down for rehearing in this Court in order that we may have further opportunity to present our views.

G. A. YOUNGQUIST,
Assistant Attorney General.

J. LOUIS MONARCH,
ANDREW D. SHARPE,
Special Assistants to the Attorney General.

February, 1932.

Certificate of Counsel.

The undersigned, counsel for respondent, the Commissioner of Internal Revenue, hereby certifies that in his judgment, the foregoing petition is well founded and is not interposed for delay.

G. A. YOUNGQUIST,
Assistant Attorney General.

ORDER DENYING REHEARINGS.

Filed and Entered March 7, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS.
FOURTH CIRCUIT.

No. 3214.

D. J. F. Strother, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

THIS COURT having at its January term, 1932, rendered its decision remanding this cause to the said United States Board of Tax Appeals for further proceedings in accordance with the opinion of this Court in case No. 3215, *Bankers Pocahontas Coal Company versus Commissioner of Internal Revenue*, in so far as it determines the questions involved herein, and without prejudice to the right of petitioner to rely upon the legal positions as to others matters urged upon this appeal, in accordance with the opinion of the Court filed herein, and the petitioner having on February 26, 1932, presented to the Court a petition for a rehearing of the said cause, and the respondent having on February 26, 1932, presented to the Court a petition for a rehearing of the said cause, and the said petitions for rehearing having been carefully considered,

IT IS NOW HERE ORDERED by this Court that the rehearings asked for, be, and the same are hereby, denied. Let mandate issue after the expiration of five days from this date.

JOHN J. PARKER,
Senior Circuit Judge.

March 7, 1932.

March 11, 1932, petition of petitioner for a stay of the mandate is filed.

Same day, order staying the mandate is filed.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR REHEARING AND REARGUMENT.

Filed in Open Court April 12, 1932.

(Style of Court and Title Omitted.)

Come now petitioners in the above entitled proceeding, by their attorneys, and tender their supplemental petition for rehearing and reargument, and move the Court for leave to file same, and to fix a date for hearing the parties on same.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys for Petitioners.

SUPPLEMENTAL PETITION OF PETITIONER FOR REHEARING.

Filed by leave granted in Open Court April 12, 1932.

(Style of Court and Title Omitted.)

By leave of Court therefor asked and granted: Petitioners respectfully request—

(1) A reconsideration of the denial of the Petition for Rehearing heretofore filed on February 26, 1932.

(2) Opportunity by oral argument to present reasons for said rehearing.

For cause:

(*a*) Court Rule 29, providing a petition for rehearing "will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the Court so determined", was construed by counsel to intend that the Court, as constituted at the hearing would *en banc* consider such petition. Accordingly, it was the impression the Court would not so sit together until April, 1932, at Richmond, Virginia. Consequently, no request for oral hearing upon the petition, and no brief in elaboration of reasons therefor was believed to be required until the Court would sit in April, 1932.

(*b*) Only after decision of these cases on January 25, 1932, did the petitioners and attorneys receive the opinion for their consideration.

On February 8, 1932, stay of the mandate was ordered on condition that within 30 days petition for rehearing

be filed or application be made for certiorari to the Supreme Court. Petitions for rehearing were duly filed by both parties, and were denied on March 7, 1932, with direction for issue of mandate after five days.

On March 11, 1932, this Court ordered a stay of mandate for 60 days pending application for certiorari. (* * * "unless otherwise ordered by this or the Supreme Court, and provided said application is filed in said Supreme Court within 60 days from this date.")

Thus, between the date of decision on January 25th and denial of rehearing on March 7, 1932, within 42 days, the petition for rehearing and its denial occurred, at a time of year and under present business conditions when the Court and counsel and litigants were necessarily engaged in giving attention and time to other important affairs of public and private character.

(*c*) As the right to change the order for stay of the mandate (quoted above) is reserved, the propriety of a rehearing is still believed to rest in and with the Court and may properly be granted if good and sufficient ground is shown therefor.

(*d*) This Court was created and constituted as a relief tribunal to the Supreme Court and strives to relieve that other great Court of the heavy labor imposed upon it, unless and until it feels bound as to finality of disposition of causes before it, when subsequent holdings after presentation of cases may and do occasion as here further consideration of fact or law.

(*e*) This decision and opinion are based on rules of law herein not pertinent to the facts, particularly in holding rules of taxation as to income of mines and their products determine the case when only real estate and its sale, *and not mines and their products,* is the subject matter presented herein. Verbal explanation is essential to

presentation of a due understanding of the facts and to show the methods of income determination approved herein as applicable to the facts of these cases find no justification in the Revenue Acts.

(*f*) That the points made against the decision and opinion in the petitioners' Petition for Rehearing and their briefs, especially their Reply Brief, upon oral presentation of their soundness, will demonstrate the propriety of a holding contrary to the pronounced decision.

(*g*) That the decision of these cases according to law upon the rights involved presents or creates no precedent in taxation, as their facts indicate their concern with a deplorable coal land condition pointing to future decreases of the purchase money payments derived from sales made before the effective date of the XVI Amendment.

(*h*) That the orders of the Court as to further disposition of the cases entail further delay to that now accrued in disposing of them. Congress may not impose excessive fines (Article VIII, Constitution), yet herein large levies against capital assets, which are not income or profits accrued after 1913, have been required and satisfied, and carry additional penalties while the power so to tax said assets is in litigation these past twelve years.

This attrition through tax and penalty and incidental expense, merely because taxpayers are legally and by due process contesting the rights asserted against them, demonstrates the power to tax is the power to destroy and that industry will languish under the oppression of taxes levied in the name of progress.

(*i*) The denial of certiorari by the Supreme Court in any case, wherein the findings appear to modify or con-

tradict previous decisions of the Supreme Court does not establish nor approve such modification or contradiction. In *Atlantic C. L. Co. v. Powe,* 283 U. S. 401, 75 L. Ed. 1142, answering this precise question the Court quoted from its opinion in *United States v. Carver,* 260 U. S. 482, 67 L. Ed. 361, wherein it decided:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

(*j*) The *briefs* filed by the litigant parties did not refer to, nor did the *opinion* of this Court cite certain Federal Court decisions *reported* since the date of the decision. Evidently neither the Court nor counsel had those decisions before them at or before the decision or the order denying rehearing; said decisions are:

Commissioner v. Brown, 54 F. (2) 563 (Federal Reporter Feb. 22, 1932).

Old Colony Railroad Co. v. Commissioner, U. S. Supreme Court Advance Ops. No. 7, 1931 Term, p. 317; 76 L. Ed. 317.

Crile v. Commissioner, 55 Fed. (2) 804 (Federal Reporter April 4, 1932).

Hernandez, Collector, v. Becker, 54 F. (2) 542. (Federal Reporter Feb. 22, 1932).

Harmel v. Commissioner, — Fed. (2) —, (Federal Reporter, — 1932).

Second National Bank v. Woodworth, 54 F. (2) 672 (Federal Reporter February 22, 1932).

Murphy Oil Co., v. Commissioner, 55 F. (2) 17 (Federal Reporter, March 21, 1932).

Brief reference is here made to these recent decisions:

Petitioners contend that before the incidence of the XVI Amendment they owned the right to receive the purchase money contracted to be paid by the purchasers of coal sold to said purchasers in 1902, upon the basis of the coal thereafter taken out of the stratum or coal seam, and the liability of petitioners to income tax upon such contract receipts is the controversial subject. The claim to said receipts, *if an unconditional obligation* existing on and before passage of the XVI Amendment, when subsequently collected, does not constitute taxable income, this being the general rule. In *Commissioner v. Brown,* 54 F. (2) 563 (C. C. A.-1), such a claim, *existing as a conditional obligation,* is held not to be income when subsequently collected, upon authority of *Burnet v. Logan,* 283 U. S. 404. These decisions read together, or separately, are an all sufficient solution of the present cases.

Petitioners contend that, having prior to the XVI Amendment and Revenue Acts made contracts and thereby sold realty and passed the title to same, the subsequent payments do not constitute taxable income, and *Old Colony Railroad Co., v. Commissioner,* U. S. Supreme Court Adv. Op. 7, 1931 Term, 317, supports this position. The second, third, fourth and fifth head-notes of that decision are:

> Second. "Premiums received on corporate bonds issued *prior* to the effective date of the Sixteenth Amendment to the Federal Constitution, authorizing Federal taxation of incomes, *may not* be made the *basis* of subsequent income taxation, although the Interstate Commerce Commission has required them to be amortized over the period of the respective lives of the bonds and a yearly ratable proportion thereof to be reported as income."

Third. "The amount of interest on bonded indebtedness which may be deducted from gross income in determining taxable income is the amount *contracted to be paid,* notwithstanding the fact that as the bonds were issued at a premium, the effective rate is less."

Fourth. "The legislature must be presumed to use words in their known and ordinary significance; and this rule is applicable to taxing acts."

Fifth. "Terms used in tax statutes are, in case of *doubt,* to be given the construction *most favorable* to the taxpayer."

Mr. Justice Roberts' reasoning in the opinion squares with the holdings referred to in the above cited cases and means that when payments are received or *contracted* to be received before taxing acts come into being, those payments can not be made a proper *basis* of *taxation* by subsequent legislation.

Petitioners contend the contract payments collected in the taxable years are not subject to tax as the realization of obligations created and existing before the XVI Amendment. In *Crile v. Commissioner,* 55 Fed. (2) 804, (C. C. A.-6), a sum of money was paid to taxpayer as part consideration of a lease and the Court says:

"Where, there is an intent to create in the 'lessee' an interest in the property itself—as by way of purchase,—even though that interest may be forfeitable by failure to perform conditions subsequent, and this intent is made manifest by the instruments duly executed to carry it into effect, the attending payment is a return of capital, and should be so regarded, at least prior to forfeiture and reversion."

Therefore, as there was here an admitted sale, the pay-

ment of purchase money is a return of capital. As the vendor is without further interest in the property neither he nor his assigns can claim depreciation or depletion as to the property conveyed.

Petitioners raised the point that for all purposes, including purposes of taxation, the statutes and rules of property in a state were controlling in the Federal Courts. This Court's decision and opinion discounts this contention, yet in *Hernandez, Collector v. Becker,* 54 F. (2d) 544, dealing with a federal estate tax, Judge Phillips held the character of the estate from which the federal tax came was controlled by the statutes and rules of property of the state.

In *Harmel v. Commissioner,* Fed. (2) (C. C. A.-5), the rule that an oil and gas lease conveys a determinable fee to minerals in place under the Texas laws and rules of property is expressly upheld, and the special capital gain provision instead of the general tax upon ordinary income, as provided in the Revenue Acts, is held to measure the income tax liability upon the resulting gain to the taxpayer.

Petitioners raised the point that the Collector and the Commissioners were in privity and a judgment against one was binding against the other. This Court discredited that position, yet *Second National Bank v. Woodworth,* 54 F. (2) 672 (Judge Simons) holds a collector of internal revenue is agent or trustee for the government and refers to and discusses at length Mr. Justice Holmes' decision in the *Sage* case, relied on in the opinion (250 U. S. 33), and his remarks are applicable to the instant cases:

> "There is an important distinction between the facts of the case at bar and those of the *Sage* case."

The distinction in the *Woodworth* case is that the judgment put forward in bar by the Collector is one against

the United States, whereas in the *Sage* case the judgment so put forward by the United States was against the Collector. In the *Woodworth* case, the judgment in bar is held sufficient on the ground that, as the suit is against the Collector by reason of his official acts as a public officer and official agent or trustee of the Government, therefore:

> "It may be conceded that a judgment against an agent does not bind the principal, but that is not to say that the converse is true, and that a judgment against the principal is not a bar against the agent, where the latter is privy with the former in respect to the subject matter of the suit."

Judge Simon, after suggesting the argument of Mr. Justice Holmes is *dicta,* rests his decision not directly upon *Sage v. United States,* but upon *Bank of Kentucky v. Stone,* 174 U. S. 799, 43 L. Ed. 1187, wherein a judgment enjoining a town from enforcing a tax was held to bar a similar proceeding against its board of assessors.

In these present cases, the judgment is against the Collector, the agent and not the principal, the United States. That a judgment against its officer is not conclusive upon the United States has long been settled on the basic grounds that the Government cannot be sued without its consent that its officers may not waive this immunity, and that the Government cannot be compelled into Court to litigate with private parties in defense of its property, as decided in *Carr v. United States,* 98 U. S. 433, 25 L. Ed. 209. But that its officer may be sued and that its other officer in privity in the matter and aiding in defending the proceeding may be, and is, bound by the ensuing judgment, is not to say that the Government is likewise bound. But saying the Government is not bound is no justification for concluding its other of-

ficer is not bound. Thus, in *Johnson v. Herold*, 161 Fed. 593, 602, sixteen actions for recovery of identical taxes were brought against various collectors by the plaintiff, and a judgment in one case was held conclusive in the others, thus binding plaintiff or the collector not a party to the decided cause.

Without further quotation from the *Woodworth* opinion, attention is invited to the analysis of the *Sage* case in this most recent, well considered opinion, particularly the last paragraph and it would seem clear that by reason and decision of the very highest court there is privity which should be recognized between *White, Collector,* and the *Commissioner of Internal Revenue* over the same subject matter—both are agents and trustees for the United States. In one case the tax illegally collected is returned, and in these cases the Commissioner is endeavoring to collect another illegally imposed tax. Both acts are by the agents and trustees of the principal. The agents are not personally liable. The right and reason of the *Woodworth* case is apparent.

Petitioners contend, if depletion is computable as an allowable deduction herein, same should be upon the basis of coal paid for and not of coal mined, pointing out that respondent took the same position before the Board. The Petition for Rehearing (pp. 22-26) discusses this issue, with some reference to *Murphy Oil Co. v. Burnet*, 55 F. (2) 17 (C. C. A.-9), wherein on January 11, 1932, the Board's position was held erroneous that payments for coal not mined constituted bonuses not subject to depletion allowances. This ruling was obtained by petition for review filed by respondent.

Judge Wilbur justifies this ruling first on the facts of the *Murphy* case, and then upon the development of the depletion principle as developed in statute, decision and regulation, and utterly destroys the Board concept which this Court has approved in its affirmance of the Board. He concludes:

> "The statute, with reference to depletion * * * is a special one * * * involving the production of oil and minerals from mines, and the consequent *return of capital by the owers of interests therein,* and controls over other general provisions of the law in regard to the return of capital investment." (Our italics.)

But, as decided above, a sale of mineral in place in Texas creates a determinable fee in the purchaser and the profit is taxable as a capital gain. As this Court has likewise decided, a sale of mineral in place in West Virginia was effected herein in 1902. As said in the *Crile* decision, *supra,* the creation of an interest in the "lessee" made the consideration a return of capital. It follows petitioners are not the owners of any interests in the mines or coal, and cannot avail themselves of depletion allowances, nor have same forced upon them.

In Conclusion.

This application is lengthy and yet incomplete, and full understanding of the facts and law depend upon verbal presentation and discussion of their aspects that the simple truth may appear. But the present and future stress of the taxpayers make such application imperative, and, with due apology that no imposition upon the time or patience of the Court or its members is intended, still these requests are made:

1. That this petition and application be permitted to be filed.

2. That opportunity be granted the parties to appear at an early date and orally present argument as to the propriety of a rehearing.

3. That upon rehearing the petitioners be declared not liable for income and profits taxes upon the contract proceeds from the sales of coal in place effected before the XVI Amendment.

Respectfully submitted,

D. J. F. STROTHER,
BANKERS POCAHONTAS
COAL CO.,
Petitioners.
By WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
Attorneys.

Certificate of Counsel.

We, Wells Goodykoontz and Camden R. McAtee, attorneys of record for the petitioners in the above styled cases for review, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

(S.) WELLS GOODYKOONTZ,
(S.) CAMDEN R. McATEE,
Attorneys for Petitioners,
Bankers Pocahontas Coal Co.,
D. J. F. Strother.

ORDER DENYING REHEARING AND STAYING MANDATE.

Filed and Entered April 29, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 3214.

D. J. F. Strother, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

ON CONSIDERATION of the supplemental petition of the pteitioner for a rehearing of the above entitled cause, filed by leave of Court on April 12, 1932,

IT IS NOW HERE ORDERED by this Court that the rehearing asked for in the supplemental petition be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the mandate of this Court in this cause be, and the same is hereby, stayed pending the application of the petitioner in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is presented in the said Supreme Court on or before May 23, 1932.

JOHN J. PARKER,
Senior Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause, as the same remain among the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of May, A. D. 1932.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for argument immediately following case No. 80, Murphy Oil Co. vs. Burnet, Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.